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MONTREAL AVIATION PROTOCOLS 3 AND 4

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Mr. PELL, from the Committee on Foreign Relations, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany Ex. B, 95-1]

The Committee on Foreign Relations, to which was referred the Two Related Protocols done at Montreal on September 25, 1975, Entitled: A. Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12, 1929, as Amended by Protocols done at The Hague, on September 28, 1955, and at Guatemala City, March 8, 1971 (hereinafter, Montreal Protocol No. 3); and B. Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12, 1929, as Amended by the Protocol done at The Hague on September 8, 1955 (hereinafter, Montreal Protocol No. 4), having considered the same, reports favorably thereon with certain conditions and recommends that the Senate give its advice and consent to ratification thereof.

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I. Purpose

Montreal Protocols 3 and 4 are amendments to the original Warsaw Convention of 1929 designed to modernize the rules applicable to the international air carriage of passengers, baggage, and cargo. In combination with amendments made at an earlier international conference in Guatemala City, they would provide for the liability of airlines without proof of fault at much higher levels than the original Warsaw system (even as amended over the years), promote speedier settlement of claims, improve the rules relating to baggage handling, ticketing procedures, and cargo documentation, and generally foster international uniformity and cooperation which were the original goals of the Warsaw's treaty. The committee's approval, however, is conditional upon the establishment and continued functioning of a satisfactory Supplemental Compensation Plan, as envisaged under Article 35A of the revised Convention, to increase substantially the recoveries available to U.S. citizens.

II. Background

The Convention for the Unification of Certain Rules Relating to International Transportation by Air (the Warsaw Convention) was drawn up in 1929. The United States became a party in 1934. Presently there are 117 countries which are parties to the Convention. The Warsaw Convention establishes uniform rules as to the rights and obligations between air carriers and users of international air transportation and creates uniformity with respect to transportation documentation—passenger tickets, baggage checks, and air way-bills. It also establishes uniform rules relating to the liability of an air carrier to its passengers in cases of death or injury from an accident or delay.

Since the early 1950's the United States has taken the lead to increase the Warsaw limit of liability for death or injury to passengers ($8,300). In 1955, a doubling of the limit, to $16,000, was agreed to at The Hague. The Hague Protocol was submitted to the Senate in 1964 and in 1965 for its advice and consent to ratification. It was accompanied by proposed legislation requiring air carriers to provide international air passengers with automatic accident insurance in the amount of $50,000 for each passenger killed or seriously injured, in addition to the amount that could be recovered under the Protocol. The legislation also provided for actual medical expenses to be recovered up to $10,000. The effective limit thus would have been $66,000 with an additional $10,000 for medical expenses. The Senate Foreign Relations Committee recommended ratification of The Hague Protocol by a vote of 16–1, if the proposed insurance legislation were also enacted. However, because of objections to the automatic insurance proposal, the legislation failed to obtain support, and the Protocol was never put to a vote.

In the summer and fall of 1965, efforts were made by the United States to obtain support for increasing the Warsaw limits to $100,000 per passenger. These efforts were unsuccessful, and the United States announced that it would withdraw from the Convention. Notice of denunciation was deposited in November 1965, to take effect in May 1966. At the same time the United States announced that it would be willing to withdraw the denunciation if, before it was to take effect, there were a reasonable prospect of an international agreement on a limit of liability in the area of $100,000 or on uniform rules with no limit of liability, and if, pending the entry into force of such international agreement, a provisional arrangement were concluded among the principal international airlines which would waive the Warsaw limits up to $75,000 per passenger. At a special ICAO meeting held in Montreal in February 1966, only one country supported the United States proposal for the Warsaw/Hague rules with a $100,000 limit, and 40 countries voted against it. Another proposal, providing for a $100,000 limit inclusive of legal costs and $70,000 exclusive, received only slightly better support—5 States for and 36 against. The meeting ended without an agreement being reached. However, the United States withdrew its denunciation in May just before it was to have taken effect, when the principal United States and foreign international air carriers agreed to a special inter-carrier arrangement, known popularly as the "Montreal Agreement." (CAB Agreement 18900, approved by Order F-23680, May 13, 1966)

The Montreal Agreement currently applies in the case of international air transportation to or from the United States (or having a stopping place within the United States). It contains two major elements:

(1) Air carriers participating in this agreement waive their defenses under Art. 20(1) of the Warsaw Convention (all necessary measures taken to avoid damages or impossibility of taking such measures).

(2) Such carriers accept a limit of liability in the cases of passenger death or injury of $75,000 (including legal fees and costs).

It should be noted that the "willful misconduct" clause (Art. 25) of the Warsaw Convention is still applicable and, thus, the $75,000 limit is avoidable.

The U.S. Government continued to pursue the objectives of revising the treaty so as to increase recoveries for claimants and establish a system providing adequate, certain and speedy recovery. Subsequent negotiations on the passenger liability question resulted in the adopting of the Guatemala City Protocol, opened for signature March 8, 1971, which increased the passenger liability limit to $100,000 (now approximately $130,000 with the devaluation of the dollar), and provided for a baggage liability limit of $1,000 per passenger (in lieu of the existing $9.00 per pound). The Guatemala City Protocol contains a system of no-fault liability, a clause to provide for the jurisdiction of U.S. courts under most circumstances, and a provision known as the "settlement inducement clause" which permits courts to impose attorneys' fees if the carrier does not make a timely settlement offer at least equivalent to the ultimate recovery. Finally, the Guatemala City Protocol permits a

nation to adopt a domestic system to supplement the passenger liability limit. The United States insisted upon this latter provision.

The detailed provisions relating to cargo shipments were not considered at the Guatemala City Diplomatic Conference. However, it was contemplated that subsequent negotiations would be held to revise these provisions. Negotiations with respect to the cargo provisions were held at an ICAO Legal Subcommittee meeting in Montreal in September 1972; an ICAO Legal Committee meeting in Montreal in October 1974; and a Working Group meeting to resolve conflicts between the cargo amendments and the provisions of the Guatemala City Protocol in Montreal in April 1975. The draft cargo provisions prepared by the 1974 ICAO Legal Committee formed the basis for the Diplomatic Conference held in Montreal from September 3 through 25, 1975.

In the period preceding the 1975 Montreal Diplomatic Conference, it also became apparent that the role of gold as the basis for world currency conversion would end. Since Article 22 of the Convention (and as amended both by The Hague and Guatemala City Protocols) provides for conversion of the liability limits to national currencies on the basis of the "poincare franc"—a measure of gold equivalency—it became apparent that a new method of currency conversion would have to be found. Following U.S. initiatives, Norway ultimately proposed that the gold monetary conversion clause be made at the Diplomatic Conference. It proposed substitution of the "Special Drawing Right" (SDR), a monetary unit used by the International Monetary Fund (IMF).

The Montreal Conference adopted four separate protocols. Three of these protocols (Additional Protocols No. 1-3) were limited in practical effect to changing the gold clause into an SDR clause. Protocol No. 1 amends the Warsaw Convention. Protocol No. 2 amends the Hague Protocol. Protocol No. 3 amends the Guatemala City Protocol. Thus Protocol No. 3 contains rules adopted at Guatemala City concerning passengers and baggage, as well as the SDR clause developed at Montreal. Montreal Protocol No. 4 includes basic amendments to the cargo provisions of the Warsaw Convention as revised by the Hague Protocol, including an SDR clause.

III. Major Provisions

The provisions of the protocols must be read in relation to the provisions of the original Warsaw Convention of 1929 and those subsequent modifications to which the United States will now choose to adhere. The United States is presently a party only to the Warsaw Convention itself; it is not a party to any of the subsequent protocols (Hague, 1955; Guatemala City, 1971) which were revisions of the Warsaw Convention. By ratifying Protocols No. 3 and 4, the United States will adopt all of the newest versions of the rules. A detailed description of these provisions is included below. However, in summary the two protocols provide as follows:

MONTREAL PROTOCOL 3

This protocol amends the Guatemala City Protocol. The following provisions are included in the Guatemala City Protocol:

An unbreakable airline liability limit of approximately $130,000, regardless of fault, in the case of passenger death or injury, $1,000 per passenger baggage liability limit;

A settlement inducement clause designed to force airlines to settle a claim in 6 months by subjecting them to added costs (including attorney fees) if in a subsequent trial a court awards more than the airline's offer;

Facilitation of suits against foreign airlines in the United States by permitting an action in the domicile of the passenger if the airline has an "establishment" in the United States;

Recognition of the right of each participating nation to establish a supplemental compensation plan to operate within its territories.

In accordance with this latter provision, the Secretary of Transportation has preliminarily approved a supplemental compensation plan (SCP) along the following lines:

1. The SCP would provide for damage recovery up to $500 million per aircraft, per incident and would compensate victims and their families for both their economic and noneconomic losses;

2. All U.S. citizens and permanent residents of the U.S. who are passengers on international flights would be covered, even if their tickets were purchased outside the United States;

3. A settlement inducement clause is included which would encourage more timely and adequate settlement offers from the SCP's insurance contractor.

It has been estimated that a $2 to $3 per ticket surcharge (to be included in the advertised ticket price) would be used to fund the insurance coverage provided by the SCP.

MONTREAL PROTOCOL NO. 4

This protocol amends and updates the cargo provisions of the Warsaw Convention, as amended by Hague. By ratifying Montreal Protocol No. 4, the United States would adopt the most recent rules with respect to cargo documentation and liability limits in cargo cases. The protocol sets a limit of 17 SDR's (about $21) per kilogram in the case of cargo.

IV. Committee Action

On July 26, 1977, the committee held hearings on the protocols and heard testimony from a number of administration and public witnesses. It considered them at a meeting of the committee on September 20, 1977, but took no action.

On September 19, 1981, the committee again heard testimony from public witnesses on the protocols and on October 22 received written confirmation that the Reagan administration supported their ratification. On November 17, 1981, the committee voted 16 to 1 to report the protocols favorably to the Senate for advice and consent with three provisos which are described *infra*. Senators voting in the affirmative were Percy, Baker, Helms, Hayakawa, Lugar, Mathias, Kassebaum, Pressler, Boschwitz, Pell, Glenn, Sarbanes, Zorinsky, Tsongas, Cranston, and Dodd. Senator Biden voted no.

The Montreal Protocols were left pending at the adjournment of the 97th Congress. They were therefore automatically re-referred to the committee under Senate rules. The committee considered them again on February 3, 1983 and ordered them favorably reported by a voice vote. Senators Pressler and Biden asked to be recorded no and Senator Tsongas voted present. Other Senators constituting a quorum were Senators Percy, Helms, Lugar, Mathias, Boschwitz, and Pell. Subsequently, the following Senators asked to be recorded in favor of the protocols: Baker, Kassebaum, Murkowski, Glenn, Sarbanes, Zorinsky, Cranston, and Dodd.

On March 8, 1983, the Senate voted in favor of the protocols, but only by a margin of 50 to 42, thereby denying the supermajority needed for advice and consent to ratification.

Following the Senate's action in 1983, the Department of Transportation revised the supplemental compensation plan to meet the concerns which had been expressed by opponents that the coverage levels of the proposed supplemental compensation plan (which would have provided only an additional $200,000 of available recovery) were still inadequate to compensate victims fully. On June 24, 1988, the Secretary of Transportation submitted a new draft plan (of which is summarized in the description of Protocol No. 3 above) as part of the administration's formal request that the Senate renew active consideration of the protocols.

On November 15, 1989, the committee held another hearing—to discuss the protocols and the provisions of the new supplemental compensation plan. At the hearing, representatives of the Departments of State, Justice, and Transportation; airline industry leaders; spokespersons for various associations of victims' families and prominent trial attorneys presented testimony to the committee. Subsequent to the November 15 hearing, the GAO was asked to make a study and prepare a report on the consequences of ratifying the protocols as they would impact inter alia, consumer protection and airline safety. On June 19, 1990, the committee held a hearing to receive the GAO's report which recommended approval of the protocols. Appendix II is a transcript of principal excerpts from that hearing.

On June 21, 1990, the committee voted 13 to 2 to report the protocols favorably to the Senate for advice and consent with the three provisions which are described below. Senators voting in the affirmative were Pell, Dodd, Kerry, Robb, Helms, Lugar, Kassebaum, Boschwitz, Pressler, Murkowski, McConnell, Humphrey, and Mack. Senators Biden and Simon voted no.

V. Committee Comments

The committee agrees with the position taken by the Ford, Carter, Reagan, and Bush administrations in support of U.S. ratification of Montreal Protocols No. 3 and 4. We support ratification with the understanding that a supplemental compensation plan will be in place to increase the recoveries available to U.S. citizens.

The Montreal Protocols are the result of decades of effort by the United States to improve the existing Warsaw treaty system. The United States has been a party to that system since 1934; limitations on airline liability are therefore not a new concept, but a fact

of life in international aviation for many years. The purpose of this arrangement has been to provide a uniform international system of rules and practices for the protection of travelers and shippers and its goal is to bring airlines around the world up to a higher and more equitable level of compensation for injury or loss of life, insure quick and reliable recoveries (in most cases within 6 months), and promote greater efficiency in the handling of cargo and baggage.

The committee is concerned that the failure to follow through on the Montreal Protocols, which were the result of long and difficult negotiating efforts by the United States, might not only undercut our influence but would actually spell the end of the Warsaw Convention. That treaty is seriously outdated at the present time, and without the ratification of these modernizing amendments and the continued vigorous leadership of the United States, it is doubtful that the Warsaw regime will survive. The result could be a lengthy period of confusion during which the rules of jurisdiction and the standards for liability would be completely unpredictable.

The committee is well aware that the tradeoff for participating in the Warsaw system, as amended by the protocols, is the agreement to an absolute ceiling on the liability of airlines to each accident victim or victim's family. If the limit set by the protocol of approximately $130,000 (the estimated current value of 100,000 SDR's, or special drawing rights) was absolute and could not be supplemented by a domestic compensation plan, the level would clearly be unacceptable. Even with the supplemental compensation plan in place, it will be desirable to seek continued increases in the amount of the airlines' absolute liability to keep pace with inflation and other circumstances.

On balance, the committee believes that the special features of international civil aviation do justify the continued participation of the United States in a system of limited liability so long as it operates to ensure swift, sure, and sufficient compensation when supplemented by a domestic compensation plan which would provide unlimited damage recoveries for U.S. citizens up to the amount of their provable losses. In effect, the Senate would be approving a two-tiered system under which the airlines would be liable for the first $130,000 per passenger and the supplemental plan would be expected to provide for recoveries beyond that amount and would cover fully the remainder of all economic and noneconomic losses with no cap on the amount. Americans who fly abroad will thus be provided with full and sufficient coverage and will receive compensation more quickly and reliably with less litigation and related expenses. The fact that this approach has been endorsed overwhelmingly by the American Bar Association, an organization not generally supportive of no-fault liability systems, is indicative of the strength of the arguments for it.

The committee was not persuaded by the principal arguments made against the protocols.

Opponents to Protocol No. 3 have long contended that the elimination of civil litigation as to fault in the case of international air accidents would undermine important safety factors. They assert that not only does an airline's concern about possible financial liability from victims' lawsuits positively influence safe operation

but also that the information revealed in the discovery process of litigation is invaluable in avoiding future disasters. The evidence suggests, however, that neither of these benefits actually results from the tort law system. In independent studies by the Rand Corp. and Clemson University on the effects of accidents on airline operations, it has been demonstrated that market forces themselves should actually play a far larger role as a safety incentive than does the fear of exposure to litigation. While compensation to victims of accidents is covered by the liability insurance already paid for by the airline, it has been shown that airlines that are perceived as unsafe after accidents lose money due to sharp decreases both in operating revenues due to cancelled bookings and in their stock prices.

With regard to the investigatory function of the tort system, it is noteworthy that the facts uncovered in that process are thereafter often unavailable to the public because of confidentiality agreements that are signed by plaintiffs as a condition to pretrial settlement. On the other hand, the governmental regulatory agencies vested with the authority to oversee, investigate and, if necessary, punish the airlines have the mandate to protect the public interest and are not bound by such restraints on information. Recently, the Presidential Commission on Aviation Security and Terrorism (which in its report endorsed ratification of the protocols) suggested that the United States strengthen the current regulatory enforcement system to ensure swift, rigorous, and accurate investigation into the cause of air catastrophes and administer stricter disciplinary actions if fault on the part of the airline is found. The committee agrees that it should not be the responsibility of the victims to uncover the truth about the cause of an air disaster—that role is properly filled by an independent, aggressive, and powerful regulatory agency.

Second, opponents of the protocols have asserted that the supplemental compensation plan is an unconscionable system of mandatory insurance which is unfair to consumers. This argument fails to recognize practical business realities. Contrary to the suggestion that the surcharge of $2 to $3 per ticket is an unprecedented and unfair imposition, it is no doubt true that a charge for insurance is, in fact, already included in the price of every ticket on every form of public transportation today. As a matter of normal practice, businesses pass through such costs to consumers as part of the price of the services provided. In order to ensure that customers are fully aware at the outset of the costs of international travel, the protocols require airlines to include the costs of the supplemental insurance in the advertised price of the ticket. Additionally, the protocols provide that the insurance contractor for the supplemental compensation plan be selected on the basis of a competitive bidding process which will provide for the benefits of the plan's no-fault coverage at the lowest cost to the public.

In an effort to portray the protocols as an intrusion into the rights of American citizens, opponents neglect to consider many of the disadvantages that experience with the current fault-based system has revealed. Relying on domestic tort law for recovery for losses sustained in air disasters has proven to be unduly time-consuming and inefficient in achieving the desired result of timely and

just compensation of victims and their families. According to the Rand study, the average claim takes 2 years to reach settlement. Compensation can take over 4 years if a trial is involved and up to 7 years or longer if the victim is attempting to prove willful misconduct on the part of the airlines in order to break the liability cap of the Warsaw regime. For victims and families who need prompt compensation for their losses, delays of several years can be devastating. In order to relieve this double hardship, the protocols were designed with a mechanism to encourage prompt settlement offers that must be adequate to compensate a family for its full losses—both economic and noneconomic. While such a mechanism cannot undo the damage that these disasters cause, it addresses the tragic result that families suffer significant and lasting financial deprivation on top of traumatic personal losses when they are struck by these misfortunes.

It has been suggested that if these protocols fail to receive advice and consent on their second consideration by the full Senate, then the United States should denounce the Warsaw Convention. Even partisans of the treaty format admit that given the current woefully low limits set by the Warsaw regime ($75,000), it is hard to justify adherence to an inadequate system. What opponents of the protocols fail to recognize, however, is that without a treaty in place, American victims of international air accidents are far from assured of adequate compensation in U.S. courts under U.S. law. For example, absent the treaty, it is uncertain that U.S. courts could exercise jurisdiction over foreign airlines that are largely owned by foreign governments because of the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. 1602 et seq.). Accidents involving Americans on flights between two foreign countries might escape jurisdiction altogether under the FSIA. (See DOT Order 87-8-8, July 31, 1987.) Even if the jurisdictional barriers are overcome, it is unclear that a U.S. court would apply our own domestic law to an accident occuring in a foreign state. Providing uniformity with respect to the jurisdiction of U.S. courts and the application of U.S. damages law when American citizens are injured in these incidents is one of the principle objectives of the protocols, and it is an objective that most assuredly serves the best interests of the vast majority of Americans who fly abroad.

Therefore, the committee recommends that the Senate advise and consent to the ratification of these protocols.

VI. Three Provisos

The committee ordered the Montreal Protocols reported favorably with three provisos (which are virtually identical to the provisos which were included in the resolutions of ratification in 1981 and 1983):

First, "that the President shall not deposit the instruments of ratification for the United States until he has determined that a satisfactory supplemental compensation plan, as reviewed and approved by the Secretary of Transportation, will be in operation for the United States;"

Second, "that the President shall give notice of denunciation of these Protocols by the United States if, at any time after their

entry into force for the United States, he determines that a satisfactory supplemental compensation plan, as periodically reviewed by the Secretary of Transportation in light of new economic or other relevant circumstances, is not in operation for the United States, or that the best interest of U.S. airline passengers are not otherwise served by continued adherence to these Protocols by the United States;" and

Third, "that the U.S. Government shall continue actively to seek to negotiate higher limits on the liability of carriers than those provided under these Protocols."

These three conditions were adopted by the committee as "provisos" rather than as "reservations" or "understandings"; as such, they are matters between the Senate and the President and need not appear as provisions of the U.S. instruments of ratification. Nevertheless, if adopted by the Senate, they would have the same force and effect as any other condition included by the Senate—whatever its designation. In short, the President can proceed to ratify the Protocols only by accepting the conditions placed upon U.S. ratification by the Senate.

The first two provisos reflect the committee's concern that ratification of the Montreal Protocols by the United States and continued U.S. participation in the Warsaw system, as thereby modified, are dependent upon the operation of a domestic Supplemental Compensation Plan to increase the recoveries available to U.S. citizens. The Secretary of Transportation would be expected to review and approve such a Supplemental Compensation Plan initially and to conduct periodic reviews of its adequacy at reasonable and regular intervals.

The third proviso reflects the committee's concern that the limits on airline liability in these Protocols should continue to be periodically increased by agreement of the parties. In that regard, the United States should continue to take the initiative, as it has for years, to see that such limits reflect realistic levels of recovery and changing economic circumstances. The committee notes that Article 42 of the revised system (see Appendix for consolidated text) would provide for automatic $15,000 increases in the limit after 5 and 10 years of entry into force. Even such increases are unlikely to keep pace with inflation and other circumstances. Therefore, the President is expected to seek to negotiate even larger increases in the liability limits provided for the Protocols in whatever international forum and by whatever means he determines to be the most productive of such an outcome.

VII. Recent Developments

Since the committee's last previous vote on the Protocols in February 3, 1983, several events have confirmed the pressing need for improvements in the existing Warsaw regime. In several recent court cases, judges have expressed open frustration with the existing Warsaw provisions on baggage and freight, and in one case in particular, *Franklin Mint Corporation* v. *TWA*, the Court of Appeals in the Second Circuit last September announced that as of February 6, 1983, it would no longer enforce the Convention limitation on airline liability for cargo because the Convention no longer

provided adequate guidance as to the value of the limitation. The District Court below had spoken with favor about the solution provided in Montreal Protocol No. 4—which involves the use of the Special Drawing Right (SDR) as a unit of measurement—but concluded that the adopting of this standard was a matter for the Senate, not the courts.

In December 1982, the District Court for the Northern District of Illinois, while deciding not to follow the more drastic approach of the Second Circuit, nevertheless complained that none of the standards available to measure liability were satisfactory. "What is needed," said the court, "is a treaty amendment, but we do not have that."

The low limits in the Warsaw Convention have also led one court to question the viability and fairness of the original liability limits. In August 1982, the Court of Appeals for the Ninth Circuit questioned whether unsatisfied claimants might not sue the U.S. Government itself in the Court of Claims.

These cases emphasize the urgency of the kind of Warsaw modernization and improvements embodied in the Montreal Protocols.

Finally, the tragic loss of life in two recent international air disasters highlights the necessity of altering the current fault-based Warsaw system of recovery. Although the limits are patently inadequate, the survivors of the deceased victims of the bombing of PanAm Flight 103 might be subjected to the limits of the Warsaw Convention ($75,000) or face the prospect of years of litigation to increase their damage awards. The downing of KAL 007 also provides a compelling example of how poorly victims' survivors are treated under the current system. Not only have they been permanently deprived of loved ones but they have also encountered frustrating delays in receiving any compensation at all due to the lengthy litigation process (which, 7 years after the accident, is still ongoing). Such examples are even more unfortunate when one considers the likelihood that future accidents in international travel will undoubtedly occur, leaving more survivors to face the same difficulties which we are aware of and which are now within our power to address.

The committee therefore continues to believe that the Montreal Protocols reflect an important and overdue reform in the international aviation system and urges the Senate to give its advice and consent to ratification.

VIII. Administration Position

Beginning with the first transmittal of the Montreal Protocols to the Senate in 1977, each administration in office has consistently endorsed their approval by the Senate. After the failure of the protocols to receive the requisite supermajority when they were voted on by the Senate in 1983, the Reagan administration participated in the process of revising the authorized supplemental compensation plan in order to make the protocols comply with the concerns of its opponents and in 1988, then-Secretary of Transportation James Burnley again asked the Senate to favorably consider the protocols.

As recently as last year, the Bush administration informed the chairman that they had placed the Montreal Protocols on the top of the administration's list of "Treaties for which there is an urgent need for Senate approval."

Finally, at the committee's November 15, 1989, Eugene J. McAllister, hearing on the protocols, the testimony of Assistant Secretary for Economic and Business Affairs for the State Department (among other witnesses from the executive branch) continued to express the strong support of the administration.

IX. Article-by-Article Analysis of Montreal Protocol No. 3

[Since Protocol No. 3 largely incorporates articles from the Guatemala City Protocol of 1971, this analysis includes the combined articles from both Protocols. Asterisks indicates the actual articles from the Montreal Protocol itself.]

CHAPTER I—AMENDMENTS TO THE CONVENTION

Article I

Article I simply specifies the Protocol 3 modifies the Warsaw Convention as that Convention is amended by The Hague Protocol and the Guatemala City Protocol.

Article II

This change eliminates language of the Convention which required delivery to passengers of a ticket containing information such as places of departure and destination and a notice of the limitation of liability. The amendment would permit the itinerary information be preserved by other means and would eliminate the provision permitting recoveries in excess of the limit for failure to deliver a ticket containing such information prior to embarkation. By eliminating that provision the Convention will permit greater flexibility in ticketing by the carriers, including introduction of computerized systems under development such as automatic credit card ticketing.

Article III

Article III makes the same changes as those made by Article II in the case of checked baggage, and for the same reasons.

Article IV

Several changes are made by this Article, i.e., (1) a change in the English text from use of the words "bodily injury" to the words "personal injury," (2) introduction of the "absolute liability" concept, (3) exclusion of all liability attributable to "the state of health of the passenger," and (4) revisions of the existing regime governing baggage.

The English text of this Protocol (Guatemala) uses the words "personal injury" rather than "bodily injury." However, the French text (the text that prevails in cases of inconsistency) and the Spanish text continue to use the words of the Warsaw Convention, "lesion corporelle" and lesion corporal." This article makes the carrier liable upon the "condition only" that "the event" causing the death or injury took place on-board the aircraft or in the

course of embarking or disembarking, i.e., liable without regard to fault and without the defenses permitted by the Warsaw Convention. However, the carrier is not liable if death or injury resulted "solely" from the state of health of the passenger (e.g., heart attack shown to be unrelated to the flight).

The distinction between "checked baggage" and "objects carried by the passenger" is abolished and the carrier is liable without fault in both cases unless the damage to baggage resulted "solely" from "inherent defect, quality or vice of the baggage."

Article V

This article makes the carrier liable for destruction, or loss of or damage to cargo sustained if the damage occurred while the cargo was in charge of the carrier regardless of the place occurrence.

Article VI

Article VI changes Article 20 of the Warsaw Convention. It strikes the provision that gave the carrier a defense in death and injury cases if it proved "that he and his agent have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." That provision is retained, however, in the limited case of carrier liability for delay of passengers and baggage. Since the Diplomatic Conference at Guatemala made no changes in the rules governing carriage of cargo, this defense was also retained in the case of "damage resulting from destruction, loss, damage or delay * * *" arising out of the carriage of cargo.

Article VII

This revision provides a uniform rule to govern contributory negligence rather than leaving it, as Article 21 of the Warsaw Convention does, to the court seized of the case, which may, "in accordance with the provisions of its own law, exonerate the carrier wholly or partially from his liability." The new language exonerates the carrier wholly or partially from "liability" to a passenger or person claiming through him to the extent that the negligent or wrongful act or omission (i.e., exploding a bomb while in flight) caused or contributed to the "damage." [As a result of the use of the words "liability" and "damage" in this amendment, it is unclear whether this article will be interpreted as reducing the degree of carrier liability or just the measure of recovery.]

Article II [Article VIII of Guatemala]

The Guatemala Protocol made significant changes in Article 22 of the Warsaw Convention as amended by The Hague Protocol. Those changes greatly increased the limits for death and personal injury cases; clarified [in conjunction with Article 24] that the limit is unbreakable; deleted language from Article 22 permitting passengers and carriers to agree to a higher limit of liability; made specific provision for limits of liability for delay of passengers and for "destruction, loss, damage or delay of baggage;" dealt separately with the regime of ability and limit of liability in the case of cargo, retaining the special declaration concept permitting agreements for higher limits in the case of cargo; and introduced a "set-

tlement inducement" clause by permitting awards of costs, including a lawyers' fees to claimants which costs are excluded from calculations of the limits, when a carrier fails to make a settlement offer within 6 months of receipt of a claim at least equal to the compensation ultimately awarded.

The monetary unit in which all limits were expressed in the Warsaw Convention and The Hague and Guatemala Protocols is the gold franc which, based on past experience under Warsaw, had been converted into dollars by U.S. courts on the basis of the official value of gold. It was on that basis that the U.S. negotiated from the revisions of the limits established by Article 22. When it became clear that the U.S. Government intended to abolish an official price of gold it was feared that if the market value of gold were used as a means of converting into local currency, it would distort the limits which had been negotiated. As a result the treaty would probably not be ratified.

To head off this result, the Montreal Conference amended Article 22 to substitute the Special Drawing Rights of the International Monetary Fund for the gold franc. The Protocol makes provision for those High Contracting Parties who are not members of the IMF to calculate the conversion into their national currency in such manner as they determine.

The last unnumbered subparagraph of Paragraph 4 was used to permit those States whose law does not permit use of a mechanism similar to the SDR to participate in the updated treaty at increased limits of liability. [It will also facilitate participation by those States in Protocol 4 dealing with cargo.]

Thus: Paragraph 1(a) of this article limits carrier liability in the carriage of persons to 100,000 SDR's for aggregate claims and specifies that in cases where local law permits periodic payments, that the equivalent value not exceed the limit.

Paragraph 1(b) establishes a limit of 4150 SDR's for delay in the case of passengers.

Paragraph 2(a) limits cargo liability to 17 SDR's per kilogram unless a special declaration is made and any required supplement has been paid. In that case the limitation becomes the declared amount.

Paragraph 2(b) specifies that only the weight of the package or packages concerned shall be taken into account in determining liability in case of loss, damage or delay of part the cargo or objects contained in the cargo. If, however, the value of other packages covered by the same waybill is affected the total weight of such package or packages shall be taken into account determining liability.

Paragraph 3(a)(b)(c) sets forth the "settlement inducement" clause by empowering all courts of the High Contracting Parties to award costs, including lawyers' fees, which shall not be taken into account in applying the limits, if a carrier does not offer to settle within 6 months after receipt of a claim "in an amount at least equal to the compensation awarded within the applicable limit." This is intended to give the carrier an incentive to settle cases within 6 months at peril of having these costs assessed in the court.

Paragraph 4 makes clear that the SDR's are the ones defined by the IMF specifies that conversion into national currencies are to be

based on the value of the SDR on the date of judgment, and that in the case of parties who are members of the IMF that the calculations are to be made using the method applied by the IMF.

In the case of parties not members of the IMF the calculations are to be made in a method determined by that party. This provision was included to permit states that are not members of IMF to participate in Additional Protocol 3 updating the Convention.

Article IX

Paragraph 1 of this article continues for the carriage of cargo the existing rules of the original Warsaw Convention with virtually no changes in language.

Paragraph 2 dealing with passengers is substantially different. Under the Convention the limit could be exceeded upon a showing of gross negligence. This paragraph in conjunction with Article X makes it clear that the limit cannot be exceeded. It is explicit that the limits cannot be exceeded "whatever the circumstances which give rise to the liability." It also makes clear that actions for damages whether founded on the "Convention, or in contract or in tort or otherwise" can only be brought subject to the conditions and limits set out in the Convention.

Article X

This article amends Article 25 of the Convention to eliminate the provision permitting the limits to be exceeded in the case of passengers. That provision is continued, however, in the case of the carriage of cargo since no substantive change was made in the cargo regime.

Article XI

This change is a further effort to assure that the limit not be exceeded. It gives the protection of the limits to servants and agents of carriers acting within the scope of employment. This is accomplished by removing the old provision voiding the limit in the case of gross negligence in the case of the carriage of passengers. Thus the article eliminates the chance that a carrier may ultimately have to make payments in excess of the limit as a result of indemnification clauses in employee contracts. In the case of the carriage of cargo the old provision is retained since no substantive changes were made in that regime.

Article XII

This amendment adds to Article 28 of the Warsaw Convention another jurisdiction in which passenger and baggage claims may be brought. Such claims may be brought in the territory of one of the Contracting Parties before a court within which the carrier has an "establishment" in cases in which the passenger has his domicile or permanent residence in the territory of the same Contracting Party. This enlarges the opportunity for American citizens to bring the action in an American court. It is the first occasion on which the English text has used the word "establishment" rather than the words "place of business" which are still used in the unamended text of Article 28. The fact that the French text uses the words "un entablissement" in all sections suggests that the same sort of

carrier presence in the jurisdiction is contemplated in both cases, notwithstanding the new language in the English text.

Article XIII

The article is new to the Convention. Whether or not it is necessary for its purposes, this article provides that no provision in the Convention, presumably the absolute liability provision, prejudices the right of recourse of a person liable under the Convention against any other persons.

Article XIV

This amendment adds Article 35A to the Convention. It is an entirely new article expressly recognizing the right of a contracting state to operate within its territory a supplemental compensation system. This article specifies that a supplemental compensation system not imposed added liability or financial or administrative burdens on the carriers. It also makes clear that such a system must not give rise to discrimination between carriers and requires that the benefits under the system be extended to passengers without regard to the carrier involved. Finally the article makes clear that any passenger, or person claiming through him, who has contributed to the system is entitled to its benefits. This is a very important article added at the behest of the United States to facilitate a plan for supplemental compensation within its territory.

Article III [Article XV of Guatemala]

The Guatemala Protocol added Article 42 to the Convention. That article provides for convening Diplomatic Conferences of the Parties to Guatemala Protocol during the fifth and tenth years after the Protocol comes into effect to review the limits of death and injury of passengers set forth in Article 22, Paragraph 1(a) of that Protocol. It further provides that any increases in the limit in force on the date of such expenses not exceed 187,000 francs ($12,500 at the time of the Guatemala Conference). Under this article the respective increases up to the specified maximum will become effective unless, before December 31 of the fifth and tenth years, the Conference by a two-thirds majority of the parties present and voting decides otherwise. Article 42 of the Guatemala Protocol further provides that the applicable limit in passenger death and injury cases shall be the one in effort on the date of the event causing the death or injury. In short, this article provides for an increase of the limit by approximately $25.000–in two steps unless otherwise decided by the Diplomatic Conference.

CHAPTER II—SCOPE OF APPLICATIONS OF THE CONVENTION AS AMENDED

Article IV

This article does not amend the amended article of Warsaw. It uses the identical standard of Article 1 of the original convention in determining specifically the "international coverage" to which the Guatemala Protocol and Additional Protocol 3 apply. It is included in both Protocols to avoid uncertainty since, at lease initially, there will be some divergence between those countries signing

the Protocols and those who are parties to the original Warsaw Convention as amended by The Hague Protocol.

CHAPTER III—FINAL CLAUSES

Articles V through XIV, the so-called final clauses are not amendments to the Warsaw Convention. They set forth such things as who may sign, the effect of ratification, entry into force, method of accession, denunciation, and the nature of the reservations; the proper reference to the protocol; how long it remains open for signature and who may sign; effect of ratification by States which are not parties to the Warsaw Convention as amended by any of the preceding protocols.

Article V provides that the treaty will be known as the Warsaw Convention as amended at The Hague, 1955, at Guatemala City, 1971, and by the Additional Protocol No. 3 of Montreal, 1975, and that it be read and interpreted as a single instrument.

Article VI opens the protocol for signature by any State until the protocol comes into force.

Article VII specifies that: the protocol shall be subject by ratification by the signatory parties; ratification by States not a party to the Warsaw Convention or any of the preceding protocols shall have the effect of accession to convention described in Article V; and instruments of ratification are to be deposited with the Government of the Polish People's Republic.

Article VIII specifies that the Protocol shall come into force 90 days after the deposit of the 30th ratification and that, when it does, it is to be registered with the United Nations by the Polish Government. This is a change from Article XX of the Guatemala Protocol which, in addition to 30 ratifications required to bring it into effect, contained the further condition that the five ICAO member states whose airlines had at least 40 percent of the total international scheduled traffic in 1970 must be among the 30 ratifying states. This condition would have prevented the protocol from coming into effect unless ratified by the United States.

Article IX states that, after coming into force, the protocol will be open for accession by any nonsignatory state and that accession by a state which is not a party to the Warsaw Convention or any of the protocols to it shall have the effect of accession to the convention as amended by each of the protocols—i.e., they will become parties to the updated treaty. Accession will be effective on the 90th day following deposit of the instrument of accession with the Polish Government.

Article X provides for denunciation of Protocol 3 effective 6 months after receipt of notification by the Polish Government. It further specifies that, as between the parties of the protocol, denunciation by any of them of the Warsaw Convention, The Hague Protocol, and the Guatemala Protocol shall not by construed as denunciation of the updated treaty—i.e., the Warsaw Convention as amended at The Hague, 1955, at Guatemala City, 1971, and by Additional Protocol No. 3 of Montreal, 1975. [This provision is in keeping with the belief of the United States that the best way to achieve universality swiftly would be denunciation of the Warsaw Convention by the United States.]

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Article XI deals with reservations to the protocol. It permits the following: a reservation to Article 22(3), the provision dealing with costs and lawyers' fees, by states whose courts under its laws are not permitted to award such costs; a reservation by any state for carriage by its military authorities who have reserved the whole capacity of an aircraft registered in that state; and a reservation to the updated treaty insofar as the carriage of cargo, mail, and postal packages are concerned. Any of these reservations may be withdrawn at any time by notification of the Polish Government.

Article XII provides for prompt notification of the parties to the convention, or amended convention, as well as the signatory or acceding states to Additional Protocol No. 3 and ICAO of the state of signature; deposit of instruments of ratification or accession; and the effective date of the protocol and other relevant information.

Article XIII merely provides that reference to the Warsaw Convention in the Guadalajara Convention shall be to the updated convention in cases where Guadalajara is governed by Protocol No. 3.

Article XIV left the protocol open for signature at ICAO [until January 1, 1976] until it comes into force and requires ICAO promptly to notify the Polish Government of any signature and the date thereof while the protocol is open for signature at ICAO.

[For and article-by-article description of Montreal Protocol No. 4, see Appendix I to this report for a consolidated text of the Warsaw Convention as it would be amended. Treaty articles from Protocol No. 4 are designated as such throughout.]

X. Entry Into Force

In accordance with Article VIII of Protocol No. 3 and Article XVIII of Protocol No. 4, each protocol will come into force on the 90th day following the deposit of the 30th instrument of ratification.

XI. Text of the Resolution of Ratification

Resolved, (two-thirds of the Senators present concurring therein) That the Senate advise and consent to the ratification of Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12, 1929, as Amended by the Protocols done at the Hague, September 28, 1955, and at Guatemala City, March 8, 1971 (hereinafter, Montreal Protocol No. 3); and Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12, 1929 as Amended by the Protocol done at The Hague on September 8, 1955 (hereinafter Montreal Protocol No. 4), provided that:

(1) the President shall not deposit the instruments of ratification for the United States until he has determined that a satisfactory supplemental compensation plan, as reviewed and approved by the Secretary of Transportation, will be in operation for the United States; and

(2) the President shall give notice of denunciation of these protocols by the United States if, at any time after their entry into force for the United States, he determines that a satisfactory supplemen-

tal compensation plan, as periodically reviewed by the Secretary of Transportation in light of new economic or other relevant circumstances, is not in operation for the United States, or that the best interests of U.S. airline passengers are not otherwise served by continued adherence to these protocols by the United States; and

(3) the U.S. Government shall continue actively to seek to negotiate higher limits on the liability of carriers than those provided under these protocols.

MINORITY VIEWS OF SENATORS BIDEN AND SIMON

The Montreal Protocols would amend the international treaty known as the Warsaw Convention that governs liability in international air transportation. On March 8, 1983, the Senate failed to ratify the Protocols by a vote of 50–42, 12 votes shy of the constitutionally required "two thirds of the Senators present." Because of a parliamentary maneuver by then Senate Majority Leader Howard Baker, the Protocols remained before the Senate for potential future consideration.

We strongly object to the Montreal Protocols and to the underlying Warsaw Convention, despite changes made to the Supplemental Compensation Plan that accompanies adoption of the Protocols. Many Senators objected to the Montreal Protocols in 1983 as unfair to the interests of the American traveling public. In 1990, the Protocols remain deeply objectionable as they are restrictive of the rights of U.S. citizen air travelers and would limit inappropriately and unnecessarily the liability and responsibility of international airlines.

WARSAW CONVENTION

The Warsaw Convention is a system of liability limits formulated in 1929 to protect the infant airline industry. It limits the liability of a carrier to $10,000 per passenger (this was subsequently increased by an inter-carrier agreement to $75,000 per passenger after the United States threatened to denounce the Warsaw Convention in 1966 to protest its low liability limits). Upon proof of "willful misconduct," however, the airline is liable for provable damages without limitation.

There are three points to understand about the Warsaw Convention before proceeding to consideration of the Protocols. First, while some deference must be given to the importance of relationships between governments with respect to international air travel, the Warsaw Convention plainly deals with relationships which exist between airlines and people who use them. The Warsaw Convention is not a treaty among governments concerning their official acts. It is essentially legislation affecting private rights—and American rights by way of treaty. Second, since the original purpose of the Warsaw Convention was to limit liability for international airlines in 1929, when international aviation was in its infancy, the Convention is outdated. Third, although the United States Senate approved of the Warsaw Convention on June 15, 1934, no debate was recorded on the Convention either in the Senate or the Foreign Relations Committee. The Senate apparently acted in a routine fashion on a matter it did not consider of great importance. It would not be unreasonable for the Senate to give

fresh consideration to whether the United States should be a party to the Warsaw Convention.

RATIONALE FOR OPPOSITION

The Montreal Protocols are revisions to the Warsaw Convention. The Protocols would:

(1) Delete the "willful misconduct" provision, thus removing the opportunity for litigation against the airline to determine fault;

(2) Make airlines absolutely liable for damages for personal injury or death, up to a new unbreakable limit of 100,000 Special Drawing Rights (approximately $130,000); and

(3) Provide that each participating nation has the right to establish a Supplemental Compensation Plan to operate within its territory, within certain guidelines.

The Montreal Protocols jeopardize the consumer rights of all American passengers on international airlines. Our strong opposition to ratification of the Montreal Protocols is based on two principles. First, we are fundamentally opposed to a system of limited liability for airlines, and thus we cannot support changes to the Warsaw Convention that preserve the existing structure. The increase in the per passenger liability limit (to approximately $130,000) proposed by the Protocols merely tinkers with an outdated system. Modern airlines have adequate resources and insurance to cover their risks—they don't need or deserve liability limits.

Second, the Protocols would eliminate the one category of conduct not subject to limitation under the Warsaw Convention—the "willful misconduct" exception, which allows a plaintiff who proves such conduct by the airline to recover unlimited damages. The Protocols would make the per passenger liability limit of $130,000 nonbreachable. This is an unconscionable intrusion by government into the rights of all passengers and families of passengers who are victims of airline misconduct. Moreover, standards like the "willful misconduct" exception provide an important safety incentive for airlines.

If the United States Senate ratifies the Montreal Protocols, we will be telling every single American who gets on an international airline:

"Don't worry about potential negligence by the airline. Don't worry about your survivors having to look into what caused this airline to crash (because we in the Senate voted to do away with fault-based litigation). Just buy this flight insurance, and everything is going to be all right."

Deletion of the "willful misconduct" provision of the Warsaw Convention would remove any opportunity for litigation based on fault. There would be no more plaintiffs' lawyers poking around in PanAm's business, no more private citizens pursuing questions about negligence.

And what would American citizens get in return for giving up their ability to sue the airline? They would get to buy flight insurance. They would have to buy flight insurance. What would the airlines get from ratification of the Montreal Protocols? Unbreachable liability limits.

This is patently unfair.

SUPPLEMENTAL COMPENSATION PLAN

With regard to the Supplemental Compensation Plan, which is the only aspect of the Protocols that has changed since the Senate's deliberation in 1983, we object to it because it is a system of mandatory insurance.

Such a system would be unprecedented. As was written recently in the *New York Law Journal,* "it would be tantamount to a product liability system under which manufacturers liability was limited and consumers would be required to buy first party insurance to pay for any losses above the manufacturer's limit."

This mandatory insurance proposal, coupled with the elimination of the "willful misconduct" exception to liability limits, amounts to a tradeoff that is patently unfair to passengers: limited liability in all cases for the airlines, a new mandatory insurance program for all passengers. In other words, beyond the liability limit under the Protocols, passengers would finance their own damage rewards, even in cases where the airline was deliberately negligent.

We understand that the Supplemental Compensation Plan has been changed. In 1983, the Administration's proposed Supplemental Compensation Plan for U.S. citizens would have provided only up to $200,000 of additional coverage per passenger, to be financed by a $2 per passenger charge. This year, the airlines and the Bush Administration have submitted a revised plan that provides for the recovery of provable economic and noneconomic damages. The new plan is meant to satisfy Senate objections to the Protocols.

We are not surprised that the Administration and airlines were willing to make this change: the Protocols require the cost of the plan to be paid by the passengers, not the airline. The plan provides for insurance benefits, not "recoveries of damages."

The per passenger surcharge is now expected to be $5. But this price is not fixed. Rather, the plan states that it "may be revised from time to time, upward or downward, through * * * negotiations with the contractor * * *" Therefore, depending on loss experience, the surcharge could be much higher. No one can say what it is going to cost.

LEGAL AUTHORITY FOR THE SUPPLEMENTAL COMPENSATION PLAN

When the Hague Protocols (the first major effort to amend the Warsaw Convention) were submitted to the Senate in the 1960's, a similar system of automatic compulsory trip insurance was submitted *in separate implementing legislation.* In 1965, the Foreign Relations Committee voted to recommend ratification of the Hague Protocols, but on the condition that separate insurance legislation be enacted within a reasonable time. The legislation aid not move in the Congress; thus the Hague Protocols were brought down.

We question whether the plan as currently devised would have sufficient statutory authority. The proponents of the Montreal Protocols have tried to construct the plan as an agreement among airlines that is subject to the approval of the Department of Transportation. But the imposition of the Supplemental Compensation Plan would apparently require an Act of Congress, because one, it man-

dates the purchase of insurance by passengers; and two, it creates jurisdiction in Federal courts.

DENOUNCE THE WARSAW CONVENTION

Rather than ratify the Montreal Protocols, we believe that the United States should denounce the Warsaw Convention. In our opinion, the U.S. Government will denounce Warsaw if the Senate rejects the Protocols once and for all.

There is no justification for limited liability of airlines in this day and age. If the U.S. were to denounce the Convention we would eliminate its restrictions on damages and venue. American travelers would be better off under a system of unlimited liability.

In the absence of the Warsaw Convention, virtually every defendant airline in the world could be served in U.S. court, and in the vast majority of cases involving U.S. citizens, U.S. law would apply. Much has been made by the proponents of the Protocols of the hypothetical American citizen traveling between two foreign points whose survivors after an accident could not sue in U.S. court. How often would that be the case? 'Rarely. How often would it not be the case? Most of the time. Should this example drive U.S. policy? Instead of denouncing the Warsaw Convention, should we thus ratify the Protocols, do away with fault-based litigation and restrict airline liability for the vast, vast majority of Americans?

The Warsaw Convention is restrictive compared to our domestic liability system. The expert witnesses called to testify before the Foreign Relations Committee were in agreement that compensation in domestic aviation accidents is greater and faster than in cases under the Warsaw Convention this is due to the treaty's liability limits and to the arduous necessity of proving "willful misconduct."

Without the Warsaw Convention, we would have essentially the same system we now have domestically for almost all Americans traveling abroad. Under a system of simple negligence and unlimited liability, rather than the arduous necessity of proving "willful misconduct" as required by the Convention, the amount of compensation paid to victims would substantially increase, as would the timeliness of restitution.

It does not follow, therefore, that ratifying the Protocols because of the supposed benefits of the Supplemental Compensation Plan is a superior course of action to denouncing the Warsaw Convention. The unprecedented supplemental insurance plan could theoretically be implemented under either scenario.

CONCLUSION

In sum, the Montreal Protocols would cement in place a 'defective system and worsen it by eliminating any opportunity for fault-based litigation. The Supplemental Compensation Plan would be an unprecedented passenger-financed insurance scheme, which could be imposed either in conjunction with the Protocols or separate and apart, which serves only as window dressing for an outdated and unfair Warsaw Convention.

We don't deny that flight insurance is a good idea. In fact, it may be a good idea to make flight insurance more readily available to

every American. That may be a great idea. We simply question why the provision of mandatory insurance must be tied to losing the ability to sue an airline? We should reject the Protocols, denounce the Warsaw Convention, and have flight insurance anyway. That way passengers would have both—insurance benefits and fault-based litigation.

To say that the Supplemental Compensation Plan makes the Montreal Protocols a good deal for American passengers is simply wrong. To solve the current problem, the Senate should go to the root of it and denounce the Warsaw Convention.

Finally, we call attention to a resolution of the Board of Directors of the group the "Victims of Pan Am 103," the largest of the groups of Lockerbie families, which was passed unanimously on June 19, 1990. It reads:

> "Now therefore be it resolved that the VICTIMS OF PAN AM FLIGHT 103 vigorously oppose United States Senate ratification of the Montreal Protocols and express strong support for denunciation of the underlying Warsaw Convention."

We voted not to report the Montreal Protocols. We will pursue our objections if and when the Protocols are taken up by the full Senate for consideration.

APPENDIX I

(Excerpt from the Report of the United States Delegation to the 1975 Montreal Conference)

THE PROVISIONS OF THE REVISED WARSAW CONVENTION APPLICABLE TO THE UNITED STATES IN THE EVENT OF RATIFICATION OF MONTREAL PROTOCOLS 3 AND 4 AND TERMINATION OF THE 1929 VERSION OF THE CONVENTION

Explanatory Note

If the Senate gives its advice and consent to ratification of Montreal Protocols 3 and 4, the intended procedure would be to wait approximately 3 months before depositing instruments of ratification. At the time of deposit, the United States would also denounce the Warsaw Convention in accordance with Article 39 thereof, and make the declarations referred to in Article XI, paragraph 1(c) of Protocol 3 and in Article XXI, paragraph 1(b) of Protocol 4. The effect of the denunciation and declarations would be that only the most modern versions of the provisions of the Warsaw Convention and its Protocols would be applicable to the United States. Denunciation of the Warsaw Convention takes effect six months after notification. The purpose of waiting 3 months before ratifying Protocols 3 and 4 would be to inform other Contracting Parties of the steps the United States intends to take and to permit them a total of approximately 9 months to complete their internal procedures if they wish to be party with the United States to a single set of the modern rules.

The substantive provisions of the revised Warsaw Convention applicable to the United States upon completion of the steps described in the Explanatory Note follow below.[1]

CHAPTER I. SCOPE—DEFINITIONS

Article 1

1. This Convention shall apply to all international transportation of persons, baggage or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise. (W—Art. 1)

[1] Material in brackets [] has been added for editorial purposes in a few places to assist in understanding the text. Lined-through language (the) would not be applicable to the United States but is found in articles containing provisions that would be applicable to the United States. Margin notes give the source of the provision (W=Warsaw Convention; H=Hague Protocol; G=Guatemala City Protocol; M3=Montreal Protocol 3; M4=Montreal Protocol 4).

2. For the purposes of this Convention, the expression international carriage means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another State, even if that State is not a High Contracting Party. Carriage between two points within the territory of a single High Contracting Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention. (H—Art. I)

3. Carriage to be performed by several successive air carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State. (H—Art. I)

Article 2

1. This Convention shall apply to transportation performed by the State or by legal entities constituted under public law provided it falls within the conditions laid down in Article 1. (W—Art. 2)

2. In the carriage of postal items the carrier shall be liable only to the relevant postal administration in accordance with the rules applicable to the relationship between the carriers and the postal administrations. (M4—Art. II)

3. Except as provided in paragraph 2 of this Article, the provisions of this Convention shall not apply to the carriage of postal items. (M4—Art. II)

Chapter II. Transportation Documents

SECTION I.—PASSENGER TICKET

Article 3

1. In respect of the carriage of passengers an individual or collective document of carriage shall be delivered containing:

a) an indication of the places of departure and destination;

b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place.

2. Any other means which would preserve a record of the information indicated in a) and b) of the foregoing paragraph may be substituted for the delivery of the document referred to in that paragraph.

3. Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage, which shall, none the less, be subject to the rules of this Convention including those relating to limitation of liability. (G—Art. II)

SECTION II.—BAGGAGE CHECK

Article 4

1. In respect of the carriage of checked baggage, a baggage check shall be delivered, which, unless combined with or incorporated in a document of carriage which complies with the provisions of Article 3, paragraph 1, shall contain:

a) an indication of the places of departure and destination;

b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place.

2. Any other means which would preserve a record of the information indicated in a) and b) of the foregoing paragraph may be substituted for the delivery of the baggage check referred to in that paragraph. (G—Art. III)

3. Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage, which shall, none the less, be subject to the rules of this Convention including those relating to limitation of liability. (G—Art. III)

SECTION III.—DOCUMENTATION RELATING TO CARGO

Article 5

1. In respect of the carriage of cargo an air waybill shall be delivered.

2. Any other means which would preserve a record of the carriage to be performed may, with the consent of the consignor, be substituted for the delivery of an air waybill. If such other means are used, the carrier shall, if so requested by the consignor, deliver to the consignor a receipt for the cargo permitting identification of the consignment and access to the information contained in the record preserved by such other means.

3. The impossibility of using, at points of transit and destination, the other means which would preserve the record of the carriage referred to in paragraph 2 of this Article does not entitle the carrier to refuse to accept the cargo for carriage. (M4—Art. III)

Article 6

1. The air waybill shall be made out by the consignor in three original parts.

2. The first part shall be marked "for the carrier"; it shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier. The third part shall be signed by the carrier and handed by him to the consignor after the cargo has been accepted.

3. The signature of the carrier and that of the consignor may be printed or stamped.

4. If, at the request of the consignor, the carrier makes out the air waybill, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor. (M4—Art. III)

Article 7

When there is more than one package:

a) the carrier of cargo has the right to require the consignor to make out separate air waybills;

b) the consignor has the right to require the carrier to deliver separate receipts when the other means referred to in paragraph 2 of Article 5 are used. (M4—Art. III)

Article 8

a) an indication of the places of departure and destination;

b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place; and

c) an indication of the weight of the consignment. (M4—Art. III)

Article 9

Non-compliance with the provisions of Articles 5 to 8 shall not affect the existence or the validity of the contract of carriage, which shall, none the less, be subject to the rules of this Convention including those relating to limitation of liability. (M4—Art. III)

Article 10

1. The consignor is responsible for the correctness of the particulars and statements relating to the cargo inserted by him or on his behalf in the air waybill or furnished by him or on his behalf to the carrier for insertion in the receipt for the cargo or for insertion in the record preserved by the other means referred to in paragraph 2 of Article 5.

2. The consignor shall indemnify the carrier against all damage suffered by him, or by any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor or on his behalf.

3. Subject to the provisions of paragraphs 1 and 2 of this Article, the carrier shall indemnify the consignor against all damage suffered by him, or by any other person to whom the consignor is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements inserted by the carrier or on his behalf in the receipt for the cargo or in the record preserved by the other means referred to in paragraph 2 of Article 5. (M4—Art. III)

Article 11

1. The air waybill or the receipt for the cargo is prima facie evidence of the conclusion of the contract, of the acceptance of the cargo and of the conditions of carriage mentioned therein.

2. Any statements in the air waybill or the receipt for the cargo relating to the weight, dimensions and packing of the cargo, as well as those relating to the number of packages, are prima facie evidence of the facts stated; those relating to the quantity, volume and condition of the cargo do not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the cargo. (M4—Art. III)

Article 12

1. Subject to his liability to carry out all his obligations under the contract of carriage, the consignor has the right to dispose of the cargo by withdrawing it at the airport of departure or destination, or by stopping it in the course of the journey on any landing, or by calling for it to be delivered at the place of destination or in the course of the journey to a person other than the consignee originally designated, or by requiring it to be returned to the airport of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and he must repay any expenses occasioned by the exercise of this right.

2. If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

3. If the carrier obeys the orders of the consignor for the disposition of the cargo without requiring the production of the part of the air waybill or the receipt for the cargo delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill or the receipt for the cargo.

4. The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Article 13. Nevertheless, if the consignee declines to accept the cargo, or if he cannot be communicated with, the consignor resumes his right of disposition. (M4—Art. III)

Article 13

1. Except when the consignor has exercised his right under Article 12, the consignee is entitled, on arrival of the cargo at the place of destination, to require the carrier to deliver the cargo to him, on payment of the charges due and on complying with the conditions of carriage.

2. Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the cargo arrives.

3. If the carrier admits the loss of the cargo, or if the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived, the consignee is entitled to enforce against the carrier the rights which flow from the contract of carriage. (M4—Art. III)

Article 14

The consignor and the consignee can respectively enforce all the rights given them by Articles 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract of carriage. (M4—Art. III)

Article 15

1. Articles 12, 13 and 14 do not affect either the relations of the consignor and the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee.

2. The provisions of Articles 12, 13 and 14 can only be varied by express provision in the air waybill or the receipt for the cargo. (M4—Art. III)

Article 16

1. The consignor must furnish such information and such documents as are necessary to meet the formalities of customs, octroi or police before the cargo can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier, his servants or agents.

2. The carrier is under no obligation to enquire into the correctness of sufficiency of such information or documents. (M4—Art. III)

Chapter III. Liability of the Carrier

Article 17

1. The carrier is liable for damage sustained in case of death or personal injury of a passenger upon condition only that the event which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable if the death or injury resulted solely from the state of health of the passenger.

2. The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or in the course of any of the operations of embarking or disembarking or during any period within which the baggage was in charge of the carrier. However, the carrier is not liable if the damage resulted solely from the inherent defect, quality or vice of the baggage.

3. Unless otherwise specified, in this Convention the term "baggage" means both checked baggage and objects carried by the passenger. (G—Art. IV)

Article 18

1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, any registered baggage, if the occurrence which caused the damage so sustained took place during the carriage by air.[1]

2. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the occurrence which caused the damage so sustained took place during the carriage by air.

3. However, the carrier is not liable if he proves that the destruction, loss of, or damage to, the cargo resulted solely from one or more of the following:

a) inherent defect, quality or vice of that cargo;

b) defective packing of that cargo performed by a person other than the carrier or his servants or agents;

c) an act of war or an armed conflict;

d) an act of public authority carried out in connexion with the entry, exit or transit of the cargo.

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[1] This provision appears in Montreal Protocol 4; it would not apply to the carriage of baggage because of the reservation to be made by the United States under Article XXI, paragraph 1(b) of that Protocol.

4. The carriage by air within the meaning of the preceding paragraphs of this Article comprises the period during which the baggage or [2] cargo is in the charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

5. The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. (M4—Art. IV)

Article 19

The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage or goods. (W—Art. 19)

Article 20

1. In the carriage of passengers and baggage the carrier shall not be liable for damage occasioned by delay if he proves that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures. (G—Art. VI)

[2.] In the carriage of passengers and baggage, and in [3] the case of damage occasioned by delay in the carriage of cargo, the carrier shall not be liable if he proves that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures. (M4—Art. V)

Article 21

[1. In the carriage of passengers and baggage:] [4] If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, the carrier shall be wholly or partly exonerated from his liability to such person to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of the death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from his liability to the extent that he proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger. (G—Art. VII)

2. In the carriage of cargo, if the carrier proves that the damage was caused by or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he derives his rights, the carrier shall be wholly or partly exonerated from his liability to the claimant to the extent that such

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[2] This provision appears in Montreal Protocol 4; it would not apply to the carriage of baggage because of the reservation to be made by the United States under Article XXI, with paragraph 1(b) of that Protocol.

[3] This provision appears in Montreal Protocol 4; it would not apply to the carriage of passengers and baggage because of the reservation to be made by the United States under article XXI, paragraph 1(b) of that Protocol.

[4] This paragraph, found in Article VII of the Guatemala City Protocol and incorporated by reference in Montreal Protocol 3, applies only to the carriage of passengers and baggage because of the reservation to be made by the United States under Article XI, paragraph 1(c) of Protocol 3.

negligence or wrongful act or omission caused or contributed to the damage. (M4—Art. VI)

Article 22 [5]

1. a) In the carriage of persons the liability of the carrier is limited to the sum of 100,000 Special Drawing Rights for the aggregate of the claims, however founded, in respect to damage suffered as a result of the death or personal injury of each passenger. Where, in accordance with the law of the court seised of the case, damages may be awarded in the form of periodic payments, the equivalent capital value of the said payments shall not exceed 100,000 Special Drawing Rights.

b) In the case of delay in the carriage of persons the liability of the carrier for each passenger is limited to 4,150 Special Drawing Rights.

c) In the carriage of baggage the liability of the carrier in the case of destruction, loss, damage or delay is limited to 1,000 Special Drawing Rights for each passenger.

2. (a) In the carriage of cargo, the liability of the carrier is limited to a sum of 17 Special Drawing Rights per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the consignor's actual interest in delivery at destination.

(b) In the case of loss, damage or delay of part of the cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damage or delay of a part of the cargo, or of an object contained therein, affects the value of other packages covered by the same air waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

3. (a) The courts of the High Contracting Parties which are not authorized under their law to award the costs of the action, including lawyers' fees, shall, in actions to which this Convention applies, have the power to award, in their discretion, to the claimant the whole or part of the costs of the action, including lawyers' fees which the court considers reasonable.

(b) The costs of the action including lawyers' fees shall be awarded in accordance with subparagraph (a) only if the claimant gives a written notice to the carrier of the amount claimed including the particulars of the calculation of that amount and the carrier does not make, within a period of six months after his receipt of such notice, a written offer of settlement in an amount at least equal to the compensation awarded within the applicable limit. This period will be extended until the time of commencement of the action if that is later.

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[5] This version of Article 22 appears in Montreal Protocol 3; it would not apply to the carriage of cargo because of the reservation to be made by the United States under Article XI, paragraph 1(c) of that Protocol.

(c) The costs of the action including lawyers' fees shall not be taken into account in applying the limits under this Article.

4. The sums mentioned in terms of Special Drawing Right in this Article and Article 42 shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgment. The value of a national currency, in terms of the Special Drawing Right of a High Contracting Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judgment, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a High Contracting Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that High Contracting Party.

Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraphs 1 and 2(a) of Article 22 may, at the time of ratification or accession or at any time thereafter, declare that the limit of liability of the carrier in judicial proceedings in their territories is fixed at a sum of 1,500,000 monetary units per passenger with respect to paragraph 1(a) of Article 22; 62,500 monetary units per passenger with respect to paragraph 1(b) of Article 22; 15,000 monetary units per passenger with respect to paragraph 1(c) of Article 22; and 250 monetary units per kilogramme with respect to paragraph 2a) of Article 22. A State applying the provisions of this paragraph may also declare that the sum referred to in paragraphs 2 and 3 of Article 42 shall be the sum of 187,500 monetary units. This monetary unit corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into the national currency concerned in round figures. The conversion of these sums into national currency shall be made according to the law of the State concerned. (M3—Art. II)

Article 22[bis] [6]

2. b) In the carriage of cargo, the liability of the carrier is limited to a sum of 17 Special Drawing Rights per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that the sum is greater than the consignor's actual interest in delivery at destination. (M4—Art. VII)

c) In the case of loss, damage or delay of part of registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package

[6] These provisions of Article 22, resulting from Montreal Protocol 4, apply to the carriage of cargo; they apply only to the carriage of cargo because of the reservation to be made by the United States under Article XXI, paragraph 1(b) of that Protocol.

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or packages concerned. Nevertheless, when the loss, damage or delay of a part of the registered baggage or cargo, or of an object contained therein, affects the value of other packages covered by the same baggage check or the same air waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability. (H—Art. XI, designated as para. (2)(c) by M4—Art. VII)

4. The limits prescribed in this article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later. (H—Art. XI)

6. The sums mentioned in terms of the Special Drawing Right in this Article shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgment. The value of a national currency, in terms of the Special Drawing Right, of a High Contracting Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judgment, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a High Contracting Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that High Contracting Party. (M4—Art. VII)

Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 2(b) of Article 22 may, at the time of ratification or accession or at any time thereafter, declare that the limit of liability of the carrier in judicial proceedings in their territories is fixed at a sum of two hundred and fifty monetary units per kilogramme. This monetary unit corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. This sum may be converted into the national currency concerned in round figures. The conversion of this sum into the national currency shall be made according to the law of the State concerned. (M4—Art. VII)

Article 23

1. Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention. (W—Art. 23, designated as para. 1 by H—Art. III)

2. Paragraph 1 of this Article shall not apply to provisions governing loss or damage resulting from the inherent defect, quality or view of this cargo carried. (H—Art. XII)

Article 24

[1.] In the carriage of passengers and baggage any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability. (G—Art. IX; the provision appears in G—Art. IX as Art. 24, para. 2.)

2. In the carriage of cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability. (M4—Art. VIII)

Article 25[7]

(G—Art. X and M4—Art. IX)

Article 25A

1. If an action is brought against a servant or agent of the carrier arising out of damage to which the Convention relates, such servant or agent, if he proves that he acted within the scope of this employment, shall be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under this Convention. (G—Art. XI)

2. The aggregate of the amounts recoverable from the carrier, his servants and agents, in that case, shall not exceed the said limits. (H—Art. XIV)

Article 26

1. Receipt by the person entitled to the delivery of baggage or goods without complaint shall be prima facie evidence that the same have been delivered in good condition and in accordance with the document of transportation. (W—Art. 26)

2. In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his disposal. (H—Art. XV)

3. Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid. (W—Art. 26)

4. Failing complaint within the times, aforesaid, no action shall lie against the carrier, save in the case of fraud on his part. (W—Art. 26)

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[7] This article would not be applicable to the United States because of the reservation to be made under Article XI, paragraph 1(c) of Montreal Protocol 3 and Article XXI, paragraph 1(b) of Montreal Protocol 4.

Article 27

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this convention against those legally representing his estate. (W—Art. 27)

Article 28

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination. (W—Art. 28)

2. In respect of damage resulting from the death, injury, or delay of a passenger or the destruction, loss, damage or delay of baggage, the action may be brought before one of the Courts mentioned in paragraph 1 of this Article, or in the territory of one of the High Contracting Parties, before the Court within the jurisdiction of which the carrier has an establishment if the passenger has his domicile or permanent residence in the territory of the same High Contracting Party. (G—Art. XII)

3. Questions of procedure shall be governed by the law of the court to which the case is submitted. (W—Art. 28, designated as para. 3 by G—Art. XII)

Article 29

1. The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.

2. The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted. (W—Art. 29)

Article 30

1. In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of article 1, each carrier who accepts passengers, baggage or goods shall be subject to the rules set out in this convention, and shall be deemed to be one of the contracting parties to the contract of transportation insofar as the contract deals with that part of the transportation which is performed under his supervision.

2. In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

3. As regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place. These carriers shall be jointly and severally liable to the passenger or to the consignor or consignee. (W—Art. 30)

Article 30A

Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person. (G—Art. XIII and M4—Art. XI)

CHAPTER IV. PROVISIONS RELATING TO COMBINED TRANSPORTATION

Article 31

1. In the case of combined transportation performed partly by air and partly by any other mode of transportation, the provisions of this convention shall apply only to the transportation by air, provided that the transportation by air falls within the terms of article 1.

2. Nothing in this convention shall prevent the parties in the case of combined transportation from inserting in the document of air transportation conditions relating to other modes of transportation, provided that the provisions of this convention are observed as regards the transportation by air. (W—Art. 31)

CHAPTER V. GENERAL AND FINAL PROVISIONS

Article 32

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless for the transportation of goods arbitration clauses shall be allowed, subject to this convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of article 28. (W—Art. 32)

Article 33

Except as provided in paragraph 3 of Article 5, nothing in this Convention shall prevent the carrier either from refusing to enter into any contract of carriage or from making regulations which do not conflict with the provisions of this Convention. (W—Art. 33 and M4—Art. XII)

Article 34

The provisions of Articles 3 to 8 inclusive relating to documents of carriage shall not apply in the case of carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business. (H—Art. XVI and M4—Art. XIII)

Article 35

The expression "days" when used in this convention means current days, not working days. (W—Art. 35)

Article 35A

No provision contained in this Convention shall prevent a State from establishing and operating within its territory a system to supplement the compensation payable to claimants under the Conven-

tion in respect of death, or personal injury of passengers. Such a system shall fulfill the following conditions:

a) It shall not in any circumstances impose upon the carrier, his servants or agents, any liability in addition to that provided under this Convention;

b) it shall not impose upon the carrier any financial or administrative burden other than collecting in that State contributions from passengers if required to do so;

c) it shall not give rise to any discrimination between carriers with regard to the passengers concerned and the benefits available to the said passengers under the system shall be extended to them regardless of the carrier whose services they have used;

d) if a passenger has contributed to the system, any person suffering damage as a consequence of death or personal injury of such passenger shall be entitled to the benefits of the system. (G—Art. XIV)

Articles 36–40 [8]

(W—Art. 41)

Article 41

Any High Contracting Party shall be entitled not earlier than two years after the coming into force of this convention to call for the assembling of a new international conference in order to consider any improvements which may be made in this convention. To this end it will communicate with the Government of the French Republic which will take the necessary measures to make preparations for such conference.

Article 42

1. Without prejudice to the provisions of Article 41, Conferences of the Parties to the Protocol done at Guatemala City on the eighth March 1971 shall be convened during the fifth and tenth years respectively after the date of entry into force of the said Protocol for the purpose of reviewing the limit established in Article 22, paragraph 1(a) of the Convention as amended by that Protocol. (G—Art. XV)

2. At each of the Conferences mentioned in paragraph 1 of this Article the limit of liability in Article 22, paragraph 1(a) in force at the respective dates of these Conferences shall not be increased by an amount exceeding 12,500 Special Drawing Rights. (M3—Art. III)

3. Subject to paragraph 2 of this Article, unless before the thirty-first December of the fifth and tenth year after the date of entry into force of the Protocol referred to in paragraph 1 of this Article the aforesaid Conferences decide otherwise by a two-thirds majority vote of the Parties present and voting, the limit of liability in Article 22, paragraph 1(a) in force at the respective dates of these Conferences shall on those dates be increased by 12,500 Special Drawing Rights. (M3—Art III)

4. The applicable limit shall be that which, in accordance with the preceding paragraphs, is in effect on the date of the event which caused the death or personal injury of the passenger. (G—Art. XV)

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[8] The final clauses of the Warsaw Convention (Articles 36–40) would no longer apply to the United States following denunciation of the Warsaw Convention. The applicable final clauses are in Montreal Protocol 3, with respect to the carriage of passengers and baggage, and Montreal Protocol 4, with respect to the carriage of cargo.

Scope of Application of the Convention as Amended

The Warsaw Convention as amended at The Hague in 1955, and at Guatemala City in 1971 and by this Protocol [9] shall apply to international carriage as defined in Article 1 of the Convention provided that the places of departure and destination referred to in that Article are situated either in the territories of two Parties to this Protocol or within the territory of a single Party to this Protocol with an agreed stopping place in the territory of another State. (M3—Art. IV)

The Warsaw Convention as amended at The Hague in 1955 and by this Protocol [10] shall apply to international carriage as defined in Article 1 of the Convention, provided that the places of departure and destination referred to in that Article are situated either in the territories of two Parties to this Protocol or within the territory of a single Party to this Protocol with an agreed stopping place in the territory of another State. (M4—Art. XIV)

Final Clauses Omitted.

Article-by-Article Analysis

ARTICLE 1

Article 1 defines the international air carriage to which the Warsaw Convention applies. The new text substitutes the words "international carriage" for "international transportation" and the phrase "agreement between the parties" for "contract made by the parties."

ARTICLE 2

Article 2(1) is unchanged.

The new text of Article 2(2) brings carriage by air of postal items within the scope of the Convention, but restricts carrier liability to claims by postal authorities. The Convention of the Universal Postal Union governs the liability of postal authorities to individuals making use of the mails:

ARTICLE 3

The new provisions of Article 3 make it possible for airlines to adopt efficient, modern passenger ticketing procedures. Paragraph 1 substantially reduces the complexity of passenger tickets, requiring recordation of only the information necessary to give notice that the carriage comes within the scope of the Convention (as defined in Article 1). Paragraph 2 allows the air carriers to substitute computer retention of the required information for actual delivery of a written ticket.

Fully automated ticketing is now technologically possible. A passenger whose reservation has been computer-recorded could check his

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[9] Montreal Protocol 3, which applies only to the carriage of passengers and baggage because of the reservation to be made by the United States under Article XI, paragraph 1(c) of that Protocol.

[10] Montreal Protocol 4, which applies only to the carriage of cargo because of the reservation to be made by the United States under Article XXI, paragraph 1(b) of that Protocol.

baggage at the curb and obtain his ticket from an airport computer terminal simply by inserting a credit card. In the future, a passenger could board the aircraft, without waiting for anyone to examine his ticket, by inserting the computer ticket into a device at the gate. Ultimate development of such a system is made possible by the new provision in Article 3.

Paragraph 3 has been revised so that non-delivery of the ticket does not allow recovery against the air carrier in excess of the limitation of liability. This is a necessary consequence of the new system in which a ticket is not required.

ARTICLE 4

The revised provisions on baggage documentation in Article 4 parallel the new ticketing rules in Article 3. Paragraph 1 substantially reduces the number of entries required on each baggage check. Paragraph 2 allows substitution of computer retention of these entries for actual delivery of a baggage check. Paragraph 3, like the corresponding provision on passenger tickets, is a consequence of elimination of the requirement for a printed baggage check.

These changes clear the way for more efficient check-in procedures. Eliminating the need to record the weight of each piece of baggage, for example, permits passengers on international flights to check their baggage at the curb just as passengers on U.S. domestic flights have been able to do for the past ten years.

ARTICLE 5

Amendments to Articles 5–16 improve and update the rules on cargo documentation and carriage.

Paragraph 1 of Article 5 repeats the Warsaw requirement that the shipper of cargo deliver an air waybill to the carrier. This document is described in articles which follow. Paragraph 2 allows an air carrier to substitute computer recordation of necessary cargo information for the air waybill, provided that the shipper consents. The shipper may then request from the carrier a receipt for the cargo which permits identification of the shipment and access to the carrier's computer records. These provisions will allow carriers to expand the electronic processing system which they already use for domestic cargo shipments. Paragraph 3 provides that the absence of electronic processing facilities at certain airports shall not entitle a carrier to refuse cargo shipments.

ARTICLE 6

The existing cargo documentation system will be simplified in certain important respects by new Article 6, the effect of which is to permit air shipments to commence even before documentation has been completed. The old requirement that the air waybill "be handed over with the goods" is specifically omitted from paragraph 1, and the old requirement that the document "shall accompany the goods" is likewise omitted from paragraph 2. In his final statement to the 1975 Montreal Conference, the United States delegate emphasized that it is no longer necessary for the air waybill physically to accompany the goods.

Although Article 6(2) still requires signatures on air waybills, Article 6(3) allows these signatures to be printed or stamped. This

permits electronic recordation. The United States delegate to the 1975 Montreal Conferences noted that the phrase "printed or stamped" in this treaty is equivalent to the phrase "in handwriting, printed in facsimile, perforated, stamped, in symbols, or made by other mechanical or electronic means" relating to maritime bills of lading set out in the UNCITRAL draft Convention on Carriage of Goods by Sea (Article 15(1)(j)).

ARTICLE 7

The new material in Article 7(b) corresponds to the provisions for electronic recordation of cargo documentation of Article 5(2). Article 7 now provides for separate cargo receipts in those situations where separate air waybills could be required.

ARTICLE 8

New Article 8 simplifies cargo documentation in the same way that Articles 3 and 4 provide for less complicated passenger and baggage documentation procedures. Instead of the long list of particulars formerly required on an air waybill, Article 8 contemplates a brief waybill or cargo receipt which sets out only the weight of the consignment and the information necessary to give notice that the carriage comes within the scope of the Convention (as defined in Article 1).

ARTICLE 9

New Article 9 deletes language which did not allow a carrier to avail itself of the Convention's liability limit if the air waybill was not made out or the list of particulars was not completed as required by Article 8 in the original Convention. This change is a consequence of the amendments to Articles 5–8.

ARTICLE 10

Paragraphs 1 and 2 of new Article 10 restate the provisions of the old article in light of the revisions in Article 5. These paragraphs make the consignor of cargo responsible for the correctness of information which he furnishes for cargo documentation. They are revised in order to make it clear that the air waybill or the data for electronic recordation can be supplied on behalf of the consignor by some other party. The consignor is required to indemnify the carrier under paragraph 2 for damages arising from deficiencies in the information furnished by or on behalf of the consignor under paragraph 1.

An added provision, paragraph 3, requires the carrier to indemnify the consignor for deficiencies in the entries on cargo documents made by or on behalf of the carrier. This provision does not affect the consignor's responsibility to furnish complete and correct information to the carrier.

ARTICLE 11

Article 11(1) is amended to provide that cargo recepits as well as air waybills are prima facie evidence of the carrier's acceptance of the goods, the contract between the parties, and the conditions of carriage specified in the receipts or waybills. Article 11(2) is amended

similarly to extend the evidentiary presumptions attached to certain statements in air waybills to the same statements in cargo receipts. Statements regarding the weight, dimensions, and packing of the cargo are prima facie evidence of those facts. Statements regarding the quantity, volume, and condition of the cargo are not prima facie evidence unless they have been checked by the carrier in the shipper's presence and the air waybill or alternative cargo documentation authorized by Article 5 so states, or the conditions to which they relate are apparent.

ARTICLE 12

Paragraph 1 of Article 12 reserves to the shipper the power to withdraw or redirect the cargo shipment, subject to his obligations to the carrier and other consignors. This paragraph is basically unchanged. Paragraph 2 of the article, also unchanged, requires the carrier to notify the shipper promptly whenever execution of the instructions given under paragraph 1 is impossible.

Paragraph 3 is also basically unchanged, except for adding a reference to cargo receipts as a consequence of the changes made in Article 5(2). Paragraph 3 makes the carrier liable for damages to any person lawfully holding the shipper's part of the air waybill or cargo receipt, if the carrier obeys the shipper's instructions under paragraph 1 without requiring production of the shipper's document.

Paragraph 4 likewise contains only minor changes. This provision terminates the shipper's power under Article 12 at the moment when the consignee's rights under Article 13 commence. The shipper may retain control of the cargo, however, if the consignee either refuses delivery or cannot be found.

ARTICLE 13

This article defines the consignee's rights to receive cargo. Except for minor drafting changes, the article is unamended.

Article 13(1) provides that, subject to the shipper's power under Article 12, the consignee is entitled to delivery of the cargo on its arrival at the destination. The shipper will not be able to withdraw the cargo unless his instructions reach the carrier before the consignee takes delivery.

Paragraphs 2 and 3 require the carrier to notify the consignee promptly of the cargo arrival, unless it has been otherwise agreed. If the carrier admits loss of the cargo or if the cargo has not arrived within seven days of the date on which it ought to have arrived, the consignee may proceed to enforce his contractural rights against the carrier.

ARTICLE 14

This article is substantially unchanged. The clarifying phrase "of carriage" was added after the word "contract" in the last clause.

ARTICLE 15

Article 15(1), taken verbatim from the Warsaw Convention, declares that Articles 12, 13, and 14 do not affect the basic contractual relations between parties interested in a cargo shipment. Article 15(2)

is amended to make the cargo receipt an alternative vehicle for varying the provisions of Articles 12, 13, and 14.

A paragraph added to this article by the 1955 Hague Protocol declared that nothing in the Convention prevented the use of negotiable air waybills. The 1975 Montreal Conference decided that such a provision was unnecessary and the paragraph was therefore not retained; nothing in the Convention prevents use of negotiable air waybills.

ARTICLE 16

The first paragraph of Article 16 obliges the shipper to provide the documents needed for customs, tax, or police procedures. The requirement that these documents accompany the cargo is deleted in order to accommodate the revisions in Article 6. A second paragraph absolves the carrier of any obligation to check the accuracy or sufficiency of Article 16 documentation. The carrier is not relieved of its responsibility with respect to the proper classification of cargo under its tariffs for rate purposes.

ARTICLE 17

Article 17 introduces no-fault liability into the Warsaw treaty system. Article 17 of the 1929 Convention declared the carrier liable for injury to passengers sustained during the carriage. Under Article 20 of the Convention, however, the carrier could avoid liability by proving either that it and its agents had taken the necessary measures to avoid injury or that it could not have taken such measures. In other words, the Warsaw Convention created only a rebuttable presumption of the carrier's liability; liability still depended on proof of fault.

Paragraph 1 of new Article 17 makes the carrier liable for the death or injury of a passenger upon condition only that the event which caused death or injury took place on board the aircraft or in the course of embarking or disembarking. Harm resulting entirely from the passenger's state of health is not included. (A comparative negligence provision in Article 21, discussed below, adds a logical qualification to Article 17). The words "personal injury" replace the phrase "wounding . . . or any other bodily injury" in order to clarify the modern meaning of the French text. See, e.g., *Krystal* v. *British Overseas Airways Co.*, 403 F. Supp. 1322 (C.D. Cal. 1975); *Husserl* v. *Swiss Air Transport Co.*, 388 F. Supp. 1238 (S.D.N.Y. 1975) (awarding damages for mental anguish alone).

Similarly, new paragraph 2 of Article 17 makes the carrier liable for destruction, loss, or damage to baggage unless the damage results entirely from some inherent defect, quality, or vice of the baggage.

Paragraph 3 largely eliminates the distinction between checked and unchecked baggage that existed in the Warsaw Convention, as do the liability provisions in revised Article 22.

ARTICLE 18

The provisions of Montreal Protocol 4 would apply to the United States only insofar as they relate to the carriage of cargo, because of the reservation made under Article XXI(1)(b) of Protocol 4. Since

new Article 18 appears in Protocol 4, paragraph 1 relating to the carriage of baggage would not apply to the United States.

Paragraph 2 declares the carrier liable for destruction, loss, or damage to cargo occurring during the carriage by air, as defined in paragraphs 4 and 5. Paragraph 3 enumerates the carrier's possible defenses. The important word "solely" in this paragraph makes these defenses unavailable whenever the carrier or some other factor is partially the cause of the damage.

ARTICLE 19

Carriers continue to be liable for the results of delay. This provision is unchanged from the Warsaw Convention.

ARTICLE 20

Article 20 of the 1929 Convention made due care a defense to all claims against the carrier. The new article makes this defense available only against claims resulting from delay.

ARTICLE 21

Article 21 has been updated by replacing the contributory negligence defense of the 1929 Convention with a comparative negligence regime. Thus, a contribution by the claimant to the damage, death, or injury will not wholly exonerate the carrier. The responsibilities of the parties will be apportioned and compensation adjusted accordingly.

ARTICLE 22

New Article 22 dramatically increases the limits of carrier liability and restates the new limits in terms of the Special Drawing Right (SDR) of the International Monetary Fund (IMF). Both the increased limits and the conversion from a gold standard to the SDR are important innovations.

The amendments raise the carrier liability limit for passenger death or injury from about $8300 per passenger ($10,000 in devalued dollars) to 100,000 SDRs per passenger, about $117,000 at present conversion rates. Carrier liability is limited to the stated sum "for the aggregate of the claims, however founded." This language, together with a related statement in Article 24, means that carriers would not be subject to multiple actions in different jurisdictions which might result in an aggregate liability per passenger in excess of 100,000 SDRs.

The limit of carrier liability for baggage is raised from $20 per kilogram to 1000 SDRs per passenger (about $1170 at present conversion rates). This change removes the need to weigh baggage and facilitates expedited check-in procedures. A provision distinguishing checked from unchecked baggage is deleted.

A new provision establishes a liability limit of 4150 SDRs (about $4855 at present conversion rates) for the delay of a passenger.

The limit of liability for cargo is 17 SDRs per kilogram (about $20 at present conversion rates), undess the shipper makes appropriate declarations of special value and pays any necessary supplementary fee at the time he delivers the cargo to the carrier. A new provision

states that, unless damage to a portion of the cargo affects the value of the whole shipment, the weight to be considered is that of the damaged packages.

Another important change in Article 22 is the addition of settlement inducement clauses. The clause which applies to passenger and baggage claims authorizes courts not already so empowered to award litigation costs, including lawyers' fees, to all claimants who do not receive an adequate settlement offer from the carrier within six months after notice of the claim or before suit is brought, if later. Such awards may be made without regard to the liability limits. The settlement inducement clause applicable to the cargo claims allows a court to award legal costs in accordance with the law of the jurisdiction and without regard to the limit of liability.

Special provisos in Article 22 allow nations which are not members of the IMF and whose law does not permit application of the SDR formula to opt for liability limits expressed in gold. These provisions allow certain nations not belonging to the 130-member IMF to become parties to the amended treaty.

ARTICLE 32

Paragraph 1, taken from the 1929 Convention, prohibits carriers from contracting to reduce their liability under the Convention. Under paragraph 2, however, carriers and shippers are permitted to make agreements which allocate responsibility for damage resulting from the inherent defect, quality, or vice of cargo.

Nothing in the Convention prohibits a carrier from making agreements, like the 1966 Montreal Agreement, which increase its liability.

ARTICLE 24

Article 24 is redrafted in order to make it clear that the liability limits set out in the amended Convention are unbreakable. It declares that all damage actions arising out of international air carriage governed by the Convention are subject to the conditions and limits of liability set out in the Convention.

ARTICLE 25

Article 25 is deleted as a consequence of the changes in Article 24 which make liability limits unbreakable.

ARTICLE 25A

New Article 25A makes it explicit that the employees and agents of the carrier acting within the scope of their employment are covered by the carrier limits of liability. This provision merely clarifies the intent of the original Convention, see REED v. WISER, 45 U.S.L.W. 2517 (2d Cir., 1977).

ARTICLE 26

This article provides for the communication of complaints to the carrier. Paragraph 2 is amended to extend the time periods within which complaints must be filed.

ARTICLE 27

Article 27, allowing actions against the legal representatives of a deceased defendant, is unchanged.

ARTICLE 28

Article 28 limits the subject matter jurisdiction of a nation's courts. *Smith* v. *Canadian Pacific Airways, Inc.*, 452 F.2d 798 (2d Cir. 1971).

The four forums provided for Warsaw Convention cases under paragraph 1 refer to nations, not to particular judicial subdivisions within a nation. Thus, any American court which otherwise has personal and subject matter jurisdiction can decide a Warsaw case when any one of the four named places is within the United States. Jursdiction based on the location of the place where the ticket was issued has been interpreted by American courts to extend to suits against any carrier which maintains a regular ticket office in this country, even if the passenger's ticket was not issued by that office. See *Eck* v. *United Arab Airlines, Inc.*, 15 N.Y.2d 53, 203 N.E.2d 640, 255 N.Y.S.2d 247 (1964).

Paragraph 2 adds a new forum to the original four. Under this paragraph, a carrier may be sued in any nation where it maintains an establishment if the passenger also has his domicile or permanent residence there. The United States delegate to the 1971 Guatemala City Conference made it clear that the word "establishment" has the same meaning as the phrase "place of business." (Minutes of the Guatemala Conference, ICAO Doc. 9040—LC/167–1, at 114, 119.) Thus, any carrier which has a general agent in the United States could be sued here on a claim involving a passenger domiciled or permanently resident in the United States.

ARTICLE 29

Article 29 establishes a two-year time bar for Warsaw suits. It is unamended.

ARTICLE 30

This article governs the respective liabilities of successive carriers who undertake parts of an undivided carriage (as defined in Article 1(3)). It is unchanged.

ARTICLE 30A

Article 30A is added to make it clear that the Convention is silent on the carriers' rights of recourse under local law against any parties who may have caused or contributed to the damages for which the carrier is liable.

ARTICLE 31

The provisions of this article, relating to carriage by more than one mode of transportation, are unamended.

ARTICLE 32

Article 32, which nullifies all agreements infringing the rules of the Convention, is unamended.

ARTICLE 33

The Convention does not require a carrier to enter into a contract or carriage, but Article 33 is amended to refer to the provision in Article 5(3) which makes absence of electronic processing facilities an impermissible reason for a carrier's refusal to accept cargo.

ARTICLE 34

The original Article 34 entirely excluded experimental or extraordinary air carriage from the Convention. The old text has been replaced by a provision which exempts from Articles 3–8 carriage in extraordinary circumstances outside the normal scope of the carrier's business.

ARTICLE 35

The definition of the word "days" remains unchanged.

ARTICLE 35A

Article 35A is an important addition to the Warsaw Convention. It recognizes that a party may establish within its territory a system to supplement compensation available under the Convention. The supplementary compensation system may be funded by collections from passengers or by other means. The system may neither impose an increase in carrier liability nor discriminate between different carriers. Likewise, it may not discriminate among the passengers who are subject to the collections or other charges to fund the system.

ARTICLES 36–40

These final clauses of the 1929 Convention are unamended. They would not apply to the United States following denunciation of the Warsaw Convention under Article 39.

ARTICLE 41

Unamended Article 41 permits any nation which is a party to the Convention to call for a new international conference to amend the treaty.

ARTICLE 42

Article 42 provides for automatic escalation of the limit of carrier liability for passenger death or injury. A conference of parties will convene at the end of both the fifth and tenth years after the provisions of the Guatemala City Protocol come into force through ratification of Protocol 3. In both years, the liability limit will automatically increase by 12,500 SDRs (about $14,625 at present conversion rates) unless by a two-thirds vote the conference decides otherwise.

The language in paragraph 2 that prevents the special conferences of the parties from raising liability limits by more than 12,500 SDRs does not preclude such increases. As the first clause of paragraph 1 makes clear, a general diplomatic conference convened under Article 4, which might be called in conjunction with the special conferences of

the parties, could raise the liability limit to any amount by amending the treaty. It could also adopt any other amendments. In this case, however, entry into force of such amendments would not be automatic but would require ratification.

Scope of Application of the Convention as Amended

ARTICLE IV OF PROTOCOL 3

This provision is to be read together with Article 1 of the Convention. The substantive effect of this provision is to limit the applicability of Protocol 3 to international carriage as defined in Article 1 in which the places of departure and destination are in the territories of two parties to Protocol 3 or within the territory of a single party to Protocol 3 with an agreed stopping place in the territory of another state.

ARTICLE XIV OF PROTOCOL 4

This provision is to be read together with Article 1 of the Convention. The substantive effect of this provision is to limit the applicability of Protocol 4 to international carriage as defined in Article 1 in which the places of departure and destination are in the territories of two parties to Protocol 4 or within the territory of a single party to Protocol 4 with an agreed stopping place in the territory of another state.

Final Clauses of Protocol 3

ARTICLE V

This provision incorporates by reference the revisions to the Warsaw Convention made at The Hague in 1955 and at Guatemala City in 1971 and defines the resulting single instrument as the Warsaw Convention as amended at The Hague, 1955, at Guatemala City, 1971, and by the Additional Protocol No. 3 of Montreal, 1975.

ARTICLE VI

This article maintains Protocol 3 open for signature until it comes into force.

ARTICLE VII

In accordance with Article VII, Protocol 3 is subject to ratification by states which sign it. Ratification by any state which is not a party to the Warsaw Convention, The Hague Protocol, and the Guatemala City Protocol has the effect of accession to the new single instrument defined in Article V. Paragraph 2 of this article has the important function of making clear that it is not necessary to ratify the Warsaw Convention or The Hague or Guatemala City Protocols in order to become a party to the new single instrument created by Protocol 3.

This article also makes Poland the depositary of Protocol 3.

ARTICLE VIII

Entry into force of Protocol 3 requires the ratification of 30 states.

ARTICLE IX

Article IX opens Protocol 3 to accession by non-signatory states. Accession by states not parties to the Warsaw Convention, The Hague Protocol, and the Guatemala City Protocol has the effect of accession to the single instrument defined in Article V.

Paragraph 2 of this article makes clear that it is not necessary to be a party to the Warsaw Convention or The Hague or Guatemala City Protocols in order to become a party to the new single instrument created by Protocol 3.

ARTICLE X

Article X allows states to denounce Protocol 3, with effect 6 months after notification of denunciation to the depositary. Paragraph 3 of this article is very important, because it makes clear that denunciation of the Warsaw Convention or of The Hague or Guatemala City Protocols is not to be construed as denunciation of the single instrument created by Protocol 3. Thus termination of any of these earlier treaties by a party to Protocol 3 will not affect its status as party to the single instrument created by Protocol 3. This provision follows logically from paragraph 2 of Article VII and paragraph 2 of Article IX, which make clear that ratification or accession to Protocol 3 does not require that a state be a party to the Warsaw Convention or The Hague or Guatemala City Protocols.

ARTICLE XI

In accordance with Article XI, only 3 reservations are permitted to Protocol 3, set out in subparagraphs (a), (b), and (c) of paragraph 1. Subparagraph (a) permits a state to refuse to apply the settlement inducement clause of Article 22, paragraph 3(a) in its territory. Subparagraph (b) permits a state not to apply Protocol 3 to carriage for its military authorities on aircraft registered in that state the whole capacity of which has been reserved for such authorities. Subparagraph (c) contains a very important provision which allows a state not to be bound by the out-dated cargo provisions of the single instrument created by Protocol 3 (these are the provisions adopted at The Hague in 1955). The declaration by a state not to be bound by the cargo provisions of Protocol 3 cannot be made until the state becomes a party to Protocol 4.

Paragraph 2 allows a state to withdraw a reservation at any time.

ARTICLE XII

Article XII sets out the duties of the depositary government, Poland.

ARTICLE XIII

This article applies to states which are also parties to the Guadalajara Convention and modifies the term "Warsaw Convention" in that Convention to include reference to the single instrument created by Protocol 3. This article has no effect on the United States, since it is not a party to the Guadalajara Convention.

ARTICLE XIV

Article XIV provides that Protocol 3 is to remain open for signature at the Ministry of Foreign Affairs of the depositary government. It also provides that Protocol 3 is done in four authentic texts in English, French, Russian, and Spanish and, in the case of any inconsistency, the French text is to prevail.

Final Clauses of Protocol 4

ARTICLE XV

This provision incorporates by reference the revisions to the Warsaw Convention made at The Hague in 1955 and defines the resulting single instrument as the Warsaw Convention as amended at The Hague, 1955, and by Protocol No. 4 of Montreal, 1975.

ARTICLE XVI

This article maintains Protocol 4 open for signature until it comes into force.

ARTICLE XVII

In accordance with Article XVII, Protocol 4 is subject to ratification by states which sign it. Ratification by any state which is not a party to the Warsaw Convention and to The Hague Protocol has the effect of accession to the new single instrument defined in Article XV. Paragraph 2 of this article has the important function of making clear that it is not necessary to ratify the Warsaw Convention or The Hague Protocol in order to become a party to the new single instrument created by Protocol 4.

This article also makes Poland the depositary of Protocol 4.

ARTICLE XVIII

Entry into force of Protocol 4 requires the ratification of 30 states.

ARTICLE XIX

Article XIX opens Protocol 4 to accession by non-signatory states. Accession by states not parties to the Warsaw Convention and The Hague Protocol has the effect of accession to the single instrument defined in Article XV.

Paragraph 2 of this article makes clear that it is not necessary to be a party to the Warsaw Convention or The Hague Protocol in order to become a party to the new single instrument created by Protocol 4.

ARTICLE XX

Article XX allows states to denounce Protocol 4, with effect 6 months after notification of denunciation to the depositary. Paragraph 3 of this article is important, because it makes clear that denunciation of the Warsaw Convention or The Hague Protocol is not to be construed as denunciation of the single instrument created by

Protocol 4. Thus termination of the Warsaw Convention or Hague Protocol by a party to Protocol 4 will not affect its status as party to the single instrument created by Protocol 4. This provision follows logically from paragraph 2 of Article XVII and paragraph 2 of Article XIX, which make clear that ratification or accession to Protocol 4 does not require that a state be a party to the Warsaw Convention or The Hague Protocol.

ARTICLE XXI

In accordance with Article XXI, only 2 reservations are permitted to Protocol 4, set out in subparagraphs (a) and (b) of paragraph 1. Subparagraph (a) permits a state not to apply Protocol 4 to carriage for its military authorities on aircraft registered in that state the whole capacity of which has been reserved for such authorities. Subparagraph (b) contains a very important provision which allows a state not to be bound by the out-dated passenger and baggage provisions of the single instrument created by Protocol 4 (these are the provisions adopted at The Hague in 1955). The declaration by a state not to be bound by the cargo provisions of Protocol 4 cannot be made until the state becomes a party to Protocol 3.

Paragraph 2 allows a state to withdraw a reservation at any time.

ARTICLE XXII

Article XII sets out the duties of the depositary government, Poland.

ARTICLE XXIII

This article applies to states which are also parties to the Guadalajara Convention and modifies the term "Warsaw Convention" in that Convention to include reference to the single instrument created by Protocol 4. This article has no effect on the United States, since it is not a party to the Guadalajara Convention.

ARTICLE XXIV

This article is designed to resolve conflicts which occur in provisions of Protocol 3 and 4 if two or more states are parties to both Protocols and do not make the declarations contained in Article XI, paragraph 1(c) of Protocol 3 and Article XXI, paragraph 1(b) of Protocol 4. The article provides that as between such states the cargo provisions of Protocol 4 (the newest versions of the cargo rules(shall prevail and the passenger and baggage provisions of Protocol 3 (the newest versions of these rules) shall prevail.

This article would have no applicability to the United States inasmuch as it is intended that the United States woud make the declarations referred to.

ARTICLE XXV

Article XXV provides that Protocol 4 is to remain open for signature at the Ministry of Foreign Affairs of the depositary government. It also provides that Protocol 4 is done in four authentic texts in English, French, Russian, and Spanish and, in the case of any inconsistency, the French text is to prevail.

APPENDIX II

PRINCIPAL EXCERPTS FROM HEARING HELD JUNE 19, 1990, ON RESULTS OF GAO STUDY OF PROTOCOL 3 TO MONTREAL AVIATION PROTOCOLS (EX. B, 95–1)

Present: Senators Pell and Biden.

The CHAIRMAN. The Committee on Foreign Relations will come to order.

This morning the committee continues its hearings on the Montreal Protocols to the Warsaw Convention. If ratified, Protocol No. 3 would revise the convention limit and the rules on airline liability for damages to passengers in the event of an accident in international air transportation.

Our witness this morning is Mr. Kenneth M. Mead, Director of Transportation Issues at the General Accounting Office. Mr. Mead will report on the results of a GAO study requested by our committee several months ago, following our last hearing on Protocol 3. The committee asked the GAO to look into several questions relating to how this protocol and an accompanying supplemental compensation plan would affect the timely and adequate compensation of victims of international air accidents, and what the impact would be on airline safety and security if the protocol were in place.

Mr. Mead, we welcome you before our committee. But before going further, I would turn to our senior member, Senator Biden, for his opening comments.

Senator BIDEN. Thank you very much, Mr. Chairman. I have a brief opening statement. But I think it is appropriate, even though we don't often make opening statements beyond the Chair and ranking member here. Since I am, basically, the odd man out here and think this is a bad idea, I would like to lay on the record at the outset my thoughts, so that the GAO folks will know some of the questions I may be asking them shortly.

Mr. Chairman, in 1983, the full Senate failed to ratify the Montreal Protocols 50 to 42. As you know, I actively opposed the protocols then and I find no compelling reason to modify my position now.

The United States presently is a party only to the Warsaw Convention, not to any of its subsequent revisions or protocols. The convention is a system of liability limits formulated in 1929, to protect the infant—and I emphasize infant—airline industry. It limits the liability of a carrier to $75,000 per passenger and, upon proof of willful misconduct, which is hard to prove under any circumstance in any civil litigation—willful misconduct, however—the airline is liable to provide for damages without limitation.

My strong opposition to the ratification of the Montreal protocols is based upon two principles. First, I am fundamentally opposed to any system of limited liability for airlines and, thus, I cannot support changes to the Warsaw Convention that preserve the existing structure. The increase in the per passenger liability to approximately $130,000 proposed by the protocols merely tinkers with an outdated system. Modern airlines have adequate resources; modern airlines have adequate insurance; modern airlines are no longer in the stage where, if they do not fly, they will die; modern airlines are here to stay; modern airlines can cover their own risk. They do not need and they do not deserve limits on their liability.

Second, the Protocols would eliminate the one category of conduct not subject to limitation under the Warsaw Convention: the willful misconduct exception. This allows a plaintiff to prove such conduct by an airline to recover unlimited damages. The protocols would make the per passenger liability limit of $130,000 nonbreachable under any circumstances. It would be nonbreachable, were we to sign onto the protocols.

I believe this is an unconscionable intrusion by Government into the rights of all passengers and families of passengers who are victims of misconduct.

I also believe that standards like willful misconduct, the willful misconduct exception, provide an important safety incentive to airlines. One of the reasons why we have the laws we have is to provide incentives to airlines who are proving every day that they are not, if I may put it this way, they are not, to the degree that passengers would like, attentive to their safety regulations.

And now we are taking away the willful misconduct provision so that, even if they are willfully engaged in conduct that is wrong, their liability is not to exceed $130,000.

With regard to the supplemental compensation plan, which is the only thing which has changed since the Senate deliberation of the protocols in 1983, I object to it because it is a system of mandatory insurance. Such a system would be unprecedented.

As was written recently in the New York Law Journal, "It would be tantamount to a product liability system under which a manufacturer's liability was limited and consumers would be required to buy first party insurance to pay for any losses above the manufacturer's limit." That is a fascinating concept in our English jurisprudential system.

It is really interesting. I am anxious to hear what you all have to say about it: how we are going to limit their liability, take away willful misconduct and the tradeoff will be that they will pay $5 a ticket, so that they are going to cover anything that may occur as a consequence of misconduct or negligence on the part of the airline?

That, to me, is a really fascinating notion.

This mandatory insurance proposal, coupled with the elimination of the willful misconduct exception to the liability limits, amounts to a tradeoff that is patently unfair to the passengers: limited liability in all cases for airlines and a new mandatory insurance program for all international passengers.

In other words, beyond the liability limit under the protocols, passengers would finance their own damage rewards, even in cases

where the airline was deliberately negligent. That is a fascinating notion.

I understand the supplemental compensation plan has been changed. In 1983, the administration's proposed supplemental compensation plan for U.S. citizens would have provided up to $200,000 of additional coverage per passenger, to be financed by a $2 per passenger charge.

In 1990, the airlines and the Bush administration have submitted a revised plan that provides for recovery of provable economic and noneconomic damages. This new plan is meant to satisfy the Senate's objections to the protocols.

I am not surprised that the administration and the airlines were willing to make this change. The protocols require that the cost of the plan be paid for by the passengers, not the airlines. The plan provides for insurance benefits, not recovery of damages. I repeat: it provides for insurance benefits, not recovery of damages. The per passenger surcharge is now expected to be about $5. But this price is not fixed. Rather, the plan states that, it may be revised from time to time, upward or downward. I want to be there when it goes downward. I want to be there when that happens. This is to be through negotiations with the contractor.

Let me read the quote again, this time without editorializing on it. "It may be revised from time to time * * * upward or downward, through * * * negotiations with the contractor."

Therefore, depending on loss experience, the surcharge could be much higher.

Regardless, the plan itself is only window dressing for a system of limited liability, the Warsaw Convention, which I objected to in 1983 and I object to today.

In conclusion, Mr. Chairman, rather than modify the Montreal protocols, I believe the United States should denounce the Warsaw Convention. In my opinion, the U.S. Government will denounce Warsaw if the Senate rejects the protocols once and for all. There is no justification for limited liability of airlines in this day and age. If the United States were to denounce the convention, we would eliminate its restrictions on damages and venue. American travelers would be better off under a system of unlimited liability. Virtually every airline in the world can be served in a U.S. court, and, under a system of simple negligence and unlimited liability, rather than the arduous necessity of proving willful misconduct, as required by the convention, the amount of compensation paid to victims would be substantially greater, as would be the timeliness of restitution.

Mr. Chairman, as you can see, this is no surprise to you. I say to you and to the witnesses that I feel fairly strongly about this. But I am a realist. I realize that it is me and I don't think there is anybody else on this committee who feels this way. But that is no less of a reason for me to make my views as vocal as they can be, hopefully as articulately as I can make them. I plan on doing what I don't often do on the floor of the U.S. Senate, speaking to this in some detail.

I thank the Chair and I yield the floor.

The CHAIRMAN. I thank my colleague. I appreciate the strength and vigor of his views and wish that this was not upon us. But, once again, it is upon us and we have to face up to it.

I would ask, unless there is objection, that a statement by the Senator from Kansas, Mrs. Kassebaum, be inserted into the record at this point.

[The prepared statement of Senator Kassebaum follows:]

PREPARED STATEMENT OF SENATOR NANCY LANDON KASSEBAUM

Mr. Chairman, I am pleased the committee will have the opportunity to hear the results of the General Accounting Office (GAO) report on the Montreal protocols. I understand that the report looks favorably upon ratification of the protocols. I am gratified by this conclusion, since it serves to further underscore the urgent need for Senate action on this matter.

The President's Commission on the PanAm 103 tragedy recently reached the same conclusion, recommending ratification of Montreal Protocol 3, together with the supplemental compensation plan. According to the report:

"The Commission believes it essential that families of victims of international aviation incidents receive just compensation without undue expense or delay. Recovery of $130,000 from the carrier in combination with an administrative claim process by which victims can recover from a fund of $500 million per aircraft per incident would be a substantial improvement over either the current system or no treaty at all. This is particularly so for those incidents where it may be difficult to attribute fault, much less willful misconduct."

Frankly, I cannot see for the life of me why there should be any opposition to ratifying these protocols. Yet, I understand the trial lawyers continue to oppose ratification. Why?

—The supplemental compensation plan has been extended to noneconomic damages as well as economic damages, so it cannot be out of concern that victims will not be adequately compensated.

—Certainly, the interminable delays and costs associated with proving willful misconduct provide no justification. Families of the victims of KAL flight 007 continue to wait for a resolution of their case, more than 6 years later.

—Perhaps it is a concern for safety. Yet no relationship has been established linking litigation of fault to promoting airline safety. The GAO report confirms this.

No, the only reason I can see for the trial lawyers' position is their longstanding opposition to any meaningful tort law reform. In their view, this is another camel's nose under the tent, the same argument that has been used against my aviation product liability legislation. Frankly, this is no argument at all. If we are really concerned about the victims of these disasters, and their families, we will move swiftly and decisively on a matter that is already 10 years overdue, ratification of the Montreal protocols.

The CHAIRMAN. I would turn at this point to Mr. Mead and ask him for his opening statement.

STATEMENT OF KENNETH M. MEAD, DIRECTOR, TRANSPORTATION ISSUES, RESOURCES, COMMUNITY, AND ECONOMIC DEVELOPMENT DIVISION, GENERAL ACCOUNTING OFFICE: ACCOMPANIED BY: JUAN TAPIA-VIDELA, EVALUATOR-IN-CHARGE, RESOURCES, COMMUNITY AND ECONOMIC DEVELOPMENT DIVISION, GAO; HOWARD VEAL, EVALUATOR, GAO; JACK WELLS, ECONOMIST, GAO; DAVID HOOPER, ATTORNEY-ADVISER, OFFICE OF GENERAL COUNSEL, GAO; AND MARTIN FITZGERALD, SPECIAL ASSISTANT TO THE GENERAL COUNSEL, GAO

Mr. MEAD. Thank you, Mr. Chairman.

Mr. Chairman, Senator Biden, we have enjoyed working over the years with you: Senator Pell, on Coast Guard matters, with the strength and vigor of your interests there; and, Senator Biden, I recall well the work on the drug forfeiture statutes several years ago.

Senator BIDEN. And you're almost always right in your recommendation.

The CHAIRMAN. I am particularly interested in that Coast Guard recommendation. I have not yet seen it and look forward to it.

Mr MEAD. Yes, sir. But today we are here on the Montreal protocols.

I would like to introduce my colleagues.

Actually, since you had enough chairs here, we put up the entire team to try to answer as many questions as you may have, as best as we can. I will introduce my colleagues at this time.

On my immediate left is Juan Tapia-Videla, who is the person who directed the bulk of our work here, and at his left is Howard Veal, who worked with Juan.

On my immediate right is Jack Wells. Jack directs all of our work in the airline competition area, in the international arena. Dave Hooper is on his right, from our Office of General Counsel. On the far right is Marty Fitzgerald, who is Special Assistant to our General Counsel.

We do appreciate the opportunity to be here today. Over the last few months, responding to your requests, we have had an opportunity to talk to many people from many different points of view in this community.

Our testimony today will focus on how the protocols will affect Americans seeking compensation for damages suffered in international flights and whether the protocols might affect the safety of international air travel.

Overall, we believe victims and their survivors would be far better off under the protocols than they are now, due primarily to the adequacy and timeliness of the compensation provisions.

Though the protocols, being as they are, an international agreement, are not perfect, they clearly provide a mechanism for getting compensation to claimants more in line with that received in domestic aviation accidents, but in a less expensive and more expeditious manner.

I would like to walk through some history of how we have come to be where we are with the Montreal protocols. This goes back to 1929, when delegates from 22 nations signed an agreement, called the Warsaw Convention. It set forth for the first time a global set of rules for the international air transport of passengers, baggage, and cargo. At the time, its purpose was to protect the industry at a time when just one accident could have financially devastated the airline.

The United States ratified this convention in 1934, and, over the years, 124 countries have done likewise.

Under the convention, an airline is presumed responsible for passenger death or injury, unless the airline can prove otherwise.

[Chart.]

Mr. MEAD. However, as the chart on the right indicates, an airline's liability is limited to about $10,000 per passenger. That is the little bar on the far left.

Victims or their survivors can obtain additional compensation if they can show willful misconduct on the part of the airline. This is called "breaking the limit."

Since the convention went into effect claimants have obtained in U.S. courts verdicts of willful misconduct in only nine cases. In one case, resulting from an accident in 1974, the courts took 15 years to find willful misconduct.

In 1955, a number of nations adopted the Hague protocol. This increased the limit from $10,000 to $20,000, which is the second bar on the chart. That amendment was ratified by over 100 countries, but not by the United States. The belief here in Congress was that those limits were too low.

Since most foreign countries ratified the Hague protocol, Americans traveling between two foreign countries today are usually subject to its limits. For example, if you travel on a flight between France and Spain, it today is subject to the $20,000 limit.

In 1965, dissatisfaction with the low limits of the Warsaw Convention and the Hague protocol led the United States to announce its intention to withdraw from the convention. As you may know, just on the eve of the day that the withdrawal was to take effect, air carriers serving the United States signed the 1966 Montreal agreement, which is completely different from the Montreal protocols. Under this Montreal agreement, the airlines accept a liability up to $75,000 per passenger. That is the third bar on the chart.

As a result of that, the U.S. agreed to remain a party to the convention. The Montreal agreement, which remains in force today, only applies to air travel to, from, or through the United States on both foreign or domestic airlines.

If you want more than $75,000, you must still prove willful misconduct on the part of the airline.

In 1975, in Montreal, four amendments were introduced to update the Warsaw Convention. These are known as the Montreal protocols and are the subject of the hearing today. There are four protocols.

The first two protocols deal with the currency of the convention; Protocol No. 3 is concerned with the airline's liability for passengers and baggage; Protocol 4 deals with cargo.

Our testimony will concentrate on the passenger provisions of Protocol No. 3.

I will now put up a couple of charts that show the essential features of Protocol No. 3.

[Charts.]

Mr. MEAD. Protocol No. 3 increases the liability limit of the airlines to $130,000, and it establishes the policy of strict liability under which the claimants will have to prove only their damages, not that the airline was at fault.

However, as Senator Biden was pointing out, Protocol No. 3 does delete the provision of the Warsaw Convention that allows claimants to recover additional amounts from the airline, should they demonstrate willful misconduct.

Recognizing that the $130,000 limit would not fully compensate the citizens of some nations, like the United States, Protocol No. 3 allows nations to set up supplemental compensation plans. I will refer to that today as a "plan."

The plan will cover both economic and noneconomic losses, like pain and suffering, loss of consortium, and will provide for total

compensation for those losses up to a global limit of $500 million per accident.

The plan will be funded through a surcharge of about $3 on tickets sold in the United States for American as well as foreign flights that originate here.

The CHAIRMAN. Excuse me, but is that only for foreign flights and not for domestic flights?

Mr. MEAD. That's correct, sir, just for international American and foreign flights that originate in the United States.

The CHAIRMAN. It would not apply, for example, if you go from Chicago to Los Angeles.

Mr. MEAD. That's correct.

The plan will cover—and this is quite important—all U.S. citizens on international flights anywhere in the world, whether or not they pay the surcharge, as well as foreigners who pay the surcharge here in the United States. So, if you are taking a flight from France to Spain, even though you have not paid any surcharge, you will be covered.

In our work, we attempted to determine the extent, timeliness, and cost of compensation under three different scenarios. One was ratification of the protocols; the second was rejection of the protocols and remaining in the convention; the third was rejection of the protocols and withdrawing from the convention.

I will deal first with the extent of compensation.

We think that Protocol No. 3, in combination with a satisfactory supplemental compensation plan, will compensate victims of airline crashes more fully than any of the other alternatives. If no international agreement governs an airline's liability, it is true that many airlines might be sued for full damages in U.S. courts. But U.S. courts have not fully compensated victims of airline crashes in the past, even under our domestic tort system.

According to a study by the Rand Corp., compensation was generally only about 40 percent of the actual economic losses. The amount of compensation for economic losses governed by the Warsaw Convention was even lower. What we have here on the chart is a comparison of Warsaw and non-Warsaw cases.

What it points out is that, while American claimants under Warsaw received, on average, about $200,000 in compensation for aviation accidents that occurred between 1970 and 1982, American claimants under the domestic system received on average about $490,000. The uncertainty of the results of litigation was an important factor encouraging acceptance of compensation that was less than the value of the actual losses.

Now, we have done some updating on this information and, it suggests that the average award today in the domestic tort system is about $800,000. The data series for Warsaw for post-1982 accidents—we just have one case—came out at $325,000.

So, the pattern is running true to form. Recoveries under the Warsaw system are about one-half of what they are under the domestic tort system.

Protocol No. 3 and the supplemental compensation plan would dramatically improve the level of compensation for three basic reasons. First, the airline's liability is raised to $130,000. Second, the plan provides up to $500 million per aircraft in each accident to

compensate claimants. That $500 million limit exceeds the largest payout to date for any airline disaster involving a single aircraft.

I think the largest payout so far was in Japan, for $400 million.

The CHAIRMAN. Just to ask a question here, why are the passengers not better off under the non-Warsaw plan when they get more money when there is a disaster?

Mr. MEAD. Why are they not better off under the non-Warsaw plan?

The CHAIRMAN. Yes, because they get more money.

Mr. MEAD. Under the non-Warsaw plan they are better off than under Warsaw.

The CHAIRMAN. Right. I thought you were saying the opposite.

Mr. MEAD. No. If I did, I misspoke. They get more money under non-Warsaw than they do under Warsaw.

The CHAIRMAN. Right. And if the Montreal Protocols were in place, would they get more or less?

Mr. MEAD. They would get more.

In fact—and we will deal with this in the Q-and-A period, you can make a case that the victims will get more money under the Montreal Protocols than they will under the domestic tort system.

The CHAIRMAN. Thank you.

Mr. MEAD. A third reason why the protocols are a dramatic improvement is that they eliminate the need to show fault on the part of the airline. This should have the effect of reducing both the cost and the uncertainty of litigation.

Let me talk about timeliness of compensation, which is an important factor, of course, for the victims who are seeking compensation.

Settling airline accident cases can take a long time. The average case required more than 2 years to settle, and cases that went to trial averaged about 4½ years.

Under the Warsaw convention, if you go to litigation on the willful misconduct issue, those cases take an average of about 7 years.

Protocol No. 3 and the plan would provide compensation more expeditiously, because people claiming damages will be required to prove only the losses that they suffered. Unlike either the current Warsaw convention or the situation that would prevail if the convention were denounced, claimants will not have to prove that the airline was at fault in any way.

Also, there are settlement inducement provisions in the protocol and the plan that would force the airline and the plan to pay claimant's legal expenses if they do not make a prompt and reasonable settlement offer. The timeframe for making those offers is roughly 9 months.

What about the costs of securing compensation? Under Protocol No. 3 and the supplemental compensation plan, the costs of securing compensation also would be lower than they are under the Warsaw convention and lower than they would be if no international agreement were in effect. This is because claimants would not have to prove airline negligence or misconduct, and they would not incur the financial costs' associated with the civil litigation of fault. However, they might still choose to contest the amount of damages offered by the airline or the plan.

In other words, if they are not satisfied with the offer that the airlines and the plan provide, they will still have to sue. The issues in litigation would revolve exclusively around the matter of damages.

In terms of litigation, about 20 percent of the compensation paid to victims of airline accidents was absorbed by the cost of litigation. Contingency fees ranged from between 15 and 25 percent. But we have information that in some cases they have gone considerably higher.

Let me turn next to the issue of gaining jurisdiction in a U.S. court.

Under the Warsaw convention, Americans flying on a foreign airline between two foreign countries might be unable to secure U.S. jurisdiction because the convention limits the options where a suit can be filed. If the United States withdrew from the Warsaw convention, most, but not all, Americans would be able to gain access to the U.S. courts.

Because Protocol No. 3 gives claimants the right to bring suits in the courts of their countries, if the airline has some form of establishment there, most claimants would be able to gain access to U.S. courts.

If claimants file a lawsuit against the supplemental compensation plan because they view the terms of the offer as unsatisfactory, the plan guarantees all of them access to U.S. courts as well as the application of U.S. law.

Regarding airline safety, opponents of Protocol No. 3 have contended that removing the litigation of fault from the compensation process would eliminate a major incentive for airlines to operate safely. In the context of the aviation industry, though, we could find little to support this point of view.

The facts are that compensation paid by the airlines has been covered by liability insurance, the premiums for which represent only about 0.2 percent of the airlines' operating revenues. And, according to the Rand Corp., the domestic tort system provides little, if any, financial incentives for the airlines to operate safely.

Market forces and Government regulatory oversight are the most important determinants of airline safety. Market forces have an impact on airline safety because an accident can significantly hurt airline revenues, in terms both of reduced consumer demand for an airline's services and the loss of a revenue producing aircraft. Throughout the world, government agencies have primary responsibility for regulating and overseeing airline operations and safety practices. In the United States, the FAA and the Transportation Safety Board have considerable influence over airline safety practices through regulations, oversight, and investigations.

We believe the President's Commission on Aviation Security and Terrorism, which endorsed the protocols, is right to emphasize that Government agencies be the ones responsible for ensuring aviation safety. We see no persuasive reason why wholly innocent victims of aviation tragedies should be expected to bear the burden of ensuring safety in order to secure compensation for the death or injury of themselves or their loved ones.

I would like to talk for a moment about the liability limit, to which Senator Biden alluded earlier.

It is true that Protocol No. 3 does limit the airlines' liability. We do not think that that situation, in and of itself, justifies rejecting the protocol, given the benefits—and this is most important—that they would provide to Americans seeking compensation for the damages they sustained in international air travel.

If the United States does not ratify the protocols and continues to be a party to the Warsaw convention, the convention will impose a heavy burden in terms of cost and time on American claimants. If the protocol goes into effect without U.S. participation, many Americans flying on foreign airlines between countries that have ratified the protocol, would be subject to an unbreakable and an unacceptably low limit on liability, regardless of the U.S. domestic tort system. If the United States withdraws from the convention altogether, some Americans flying on foreign airlines between two foreign countries might not secure full compensation due to the problems of obtaining jurisdiction in U.S. courts or the application of U.S. law.

If Americans were to secure jurisdiction, they would still have to prove fault before litigating for damages. That is a key distinguishing feature, of course, between the protocol's proposal and the domestic tort system, as our domestic tort system will require victims to prove that the airline was at fault, whereas the plan does not.

Proving fault can be a lengthy, difficult, and expensive process, even under our domestic system. But it can be even more difficult when the accident site is overseas or little evidence exists, and in international aviation accidents that are the result of terrorist acts or unknown causes, proving airline fault may not be possible for the victims of these aviation tragedies.

While the protocol does raise an airline's liability limit to about $130,000 per passenger, this limit is too low because it was set in 1975, when the Montreal protocols were first signed. We believe it should be raised to reflect its loss of value due to inflation as well as to increase the airlines' liability.

Thus, if the protocol is ratified, we think the U.S. Government should immediately seek to negotiate an increase in the liability limit. But it should be recognized that raising the limit will not in any way affect the compensation that will be paid to the claimants. It would increase only the relative amount that will be paid by the airline's insurer, rather than the insurer that is selected to administer the compensation plan.

So, in summary, we believe that Protocol No. 3 and the supplemental compensation plan, while certainly not perfect, offer a reasonable solution for Americans seeking full, timely, and certain compensation for damages.

This would constitute a marked improvement over the very lengthy, expensive, and inadequate system in use today.

Senator Biden, we can take any questions you might have.

[The prepared statement of Mr. Mead follows:]

PREPARED STATEMENT OF KENNETH M. MEAD

We appreciate the opportunity to testify on how the Montreal protocols would affect the level and timeliness of compensation for victims of international aviation accidents and whether the protocols might also affect the safety of international air

travel.[1] The U.S. Government has long been dissatisfied with the low levels of compensation permitted under international agreements, and the Montreal protocols are designed to address these deficiencies. Our work has shown the following:

—The Montreal protocols would more fully compensate Americans for economic and noneconomic losses because the protocols increase the current limit on an airline liability to about $130,000 per passenger, and provide for a plan to supplement compensation above this limit.[2]

—They would provide for more timely restitution by not requiring claimants to prove the fault of the airlines and by furnishing incentives for airlines to settle claims quickly.

—The protocols would increase the likelihood that Americans will be able to bring suits in U.S. courts, if compensation offers are unsatisfactory, because they add the country where the passenger resides as a new basis of jurisdiction.

—It is unlikely that ratification of the protocols would adversely affect airline safety. Although the protocols would eliminate the civil litigation of fault, the available evidence indicates that litigation has not had an effect on airline safety.

The Montreal protocols raise the liability limits of the airlines and provide a mechanism for getting compensation to claimants more in line with that received in domestic aviation accidents and in a less expensive and more expeditious manner. The protocols represent a marked improvement over the current international agreements that govern compensation of claimants, and offer better chances of recovering damages to Americans traveling abroad. They also offer a foundation upon which to increase the liability of the airlines and to amend the liability rules as necessary.

After briefly recounting the chronology of events that led up to the Montreal protocols, we will describe the principal elements of the protocols and their likely effect on the level and timeliness of compensation for U.S. victims of international aviation accidents.

HISTORICAL DEVELOPMENT OF THE WARSAW CONVENTION [3]

In 1929, delegates from 22 nations meeting in Warsaw, Poland, signed an agreement, the Warsaw Convention, creating a global set of rules governing the international air transportation of passengers, baggage, and cargo. A uniform set of rules was needed because the nations of the world had different legal systems and customs. The Warsaw Convention, among other things, established the bases for determining jurisdiction in the case of an accident and set limits on the liability of airlines. The drafters of the convention wanted to protect the infant aviation industry at a time when a single catastrophic accident could have financially devastated an airline. The United States ratified the convention in 1934, and over the years 124 countries have adopted the convention.

In the event of an accident, under the Warsaw Convention, an airline is presumed to be responsible for a passenger's death or injury unless the airline can prove otherwise. However, the airline's liability is limited to about $10,000 per passenger. Victims or their survivors can obtain additional compensation only if they can show willful misconduct on the part of the airline or if the airline failed to deliver a ticket that, among other things, included a notice of the airline's limited liability. Since the convention went into effect in 1933, claimants have obtained in U.S. courts verdicts of willful misconduct for the death and injury of passengers in only nine cases.[4] In one case resulting from an aviation accident in 1974, the courts took

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[1] The Montreal Aviation Protocols were transmitted to the Senate in 1977.

[2] Economic losses include, for example, lost income and the imputed value of household services. Noneconomic losses are based on such considerations as mental anguish, pain and suffering, and loss of companionship.

[3] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Warsaw, October 12, 1929.

[4] See *American Airlines* v. *Ulen, 186 F.2d 529 (D.C. Cir. 1949)*; *KLM* v. *Tuller*, 292 F.2d 775 (D.C. Cir. 1961); *Leroy* v. *Sabena Belgian World Airlines*, 344 F.2d 266 (2nd Cir. 1965); *Reiner* v. *Alitalia Airlines*, 9 Av.Cas. 18228 (CCH) (1966); *In re Pago-Paao Aircrash of January 30. 1974*, (unreported decision) (9th Cir. 1982); *Tarar* v. *Pakistan International Airlines*, 554 F. #Supp. 471, (S.D. Tex. 1982); *Butler* v. *Aeromexico*, 774 F.2d 429 (11th Cir. 1985); *Korean AirLines Disaster of September 1, 1983*, 829 F.2d 1171 (D.C. Cir. 1989); and *In re Aircrash in Bali, Indonesia*, 871 F.2d 812 (9th Cir. 1989).

15 years to find willful misconduct.[5] Another case resulting from an aviation incident in 1983 is still in litigation after more than 6 years, with the willful misconduct verdict currently under appeal.[6]

CHANGES TO THE 1929 WARSAW CONVENTION

In 1955, a number of nations adopted the Hague Protocol, which increased the limit on an airline's liability from $10,000 to $20,000 per passenger. This amendment has been ratified by 109 countries but was not ratified by the United States because the Congress believed the liability limit was too low to fully compensate for the loss of American lives. Since most foreign countries ratified the Hague protocol, Americans traveling between two foreign points are usually subject to the limit it defines for compensation even though the United States has not ratified this protocol. For example, a flight between France and Spain is subject to the $20,000 liability limit of the Hague protocol.

Dissatisfaction with the low liability limits of the Warsaw Convention and the Hague protocol led the United States to announce in 1965 its intention to withdraw from the convention. On the eve of the withdrawal, air carriers serving the United States signed the 1966 Montreal Agreement, whereby they accepted a liability of up to $75,000 per passenger for death or injuries, regardless of their fault. As a result, the United States agreed to remain a party to the convention. The Montreal agreement applies to air travel to, from, or through the United States on both foreign and domestic airlines. For example, a flight from the United States to France is subject to the 1966 Montreal Agreement limit of $75,000. Compensation beyond $75,000 still requires claimants to prove willful misconduct by the airline. A few countries—including Italy, West Germany, and the United Kingdom—have required airlines to accept higher liability limits, the highest of these being $130,000.

THE MONTREAL PROTOCOLS

At a meeting of member states of the International Civil Aviation Organization (ICAO) in Montreal in 1975, four amendments (protocols) to update the Warsaw Convention were introduced. Protocol Nos. 1 and 2 make the special drawing rights (SDR's) of the International Monetary Fund the currency of the Warsaw Convention and the Hague protocol, respectively. The special drawing right is an international reserve asset whose value is based on the average worth of the world's five major currencies (U.S. dollar, British pound sterling, French franc, West German mark, and Japanese yen). Protocol No. 3 is concerned with an airline's liability for passengers and baggage. Protocol No. 4 changes the rules governing liability for cargo. Since only Protocol No. 3 is controversial, our testimony will concentrate on its provisions for passengers.[7]

Montreal Protocol No. 3 increases an airline's liability limit to 100,000 SDR's, about $130,000, and establishes a policy of strict liability, under which claimants have to prove only that damages resulted from an accident, not that the airline involved was at fault. However, Protocol No. 3 deletes the provisions of the Warsaw Convention that allow claimants to recover additional amounts from the airlines, including the willful misconduct provision.

In recognizing that the 100,000 SDR liability limit would not fully compensate the citizens of some nations, Protocol No. 3 allows nations to set up supplemental compensation programs. Accordingly, the airline industry is developing a supplemental compensation plan following guidelines prepared by the U.S. Department of Transportation to ensure that Americans traveling abroad can be more fully compensated for loss of life or injury. The plan will cover both economic and noneconomic losses and will provide for total compensation of up to $500 million per aircraft for each accident. By providing higher compensation for economic and noneconomic damages, the proposed supplemental compensation plan addresses the main objection raised in the past regarding the level of compensation provided by the two previous versions of the plan. The first version of the plan provided for up to $200,000 in compensation, while the second version provided for unlimited compensation, but for economic damages only.

The supplemental compensation plan will be funded through a surcharge on tickets sold in the United States for international flights originating here. All airlines, both American and foreign, selling these tickets must collect the surcharge. The plan will cover all U.S. citizens and permanent residents on international flights

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[5] See *In re Aircrash in Bali, Indonesia,* supra.

[6] See *In re Korean AirLines Disaster of September 1, 1983,* supra.

[7] Montreal Protocol No. 3 sets an airline liability limit for loss, damage, or delay of baggage at 1,000 SDR's, about $1,300.

whether or not they pay the surcharge, as well as foreigners who pay the surcharge when leaving the United States. Americans on domestic flights in foreign countries would not be covered. The amount of the surcharge will be determined by competitive bids from potential plan contractors. The plan and the contractor of the plan must be approved by the U.S. Secretary of Transportation.

Both the protocol and the U.S. plan contain provisions to induce prompt settlement of claims. If no settlement is reached with an airline or the contractor of the plan, claimants can bring lawsuits against the airline or the contractor to obtain compensation for damages. Under the settlement inducement provisions of the protocol and the plan, the courts may impose all or part of the claimant's costs of litigation on the airline or the contractor.[8] After settling a claim, the contractor has the right to recover damages from potentially liable parties, other than the airline, to the extent of their culpability.

Under the Warsaw Convention, claimants could elect to bring lawsuits against an airline in any of four jurisdictions—the place the ticket was bought, the destination, the nation of the carrier, or the nation where the airline has its principal place of business. Protocol No. 3 adds a fifth choice—the country of the victim if the airline has an establishment there. This provision will ensure that most Americans will have access to U.S. courts and U.S. law if they are dissatisfied with the compensation offers and choose to litigate damages.

MONTREAL PROTOCOL NO. 3 COMPARED WITH THE ALTERNATIVES

Senate action on the Montreal protocols may lead to one of the following outcomes:

—the protocols can be ratified;

—the protocols can be rejected, leaving in place the current Warsaw Convention system; or

—the protocols can be rejected and the President can denounce the Warsaw Convention.

EXTENT OF COMPENSATION

We believe that Montreal Protocol No. 3, in combination with a satisfactory supplemental compensation plan, would compensate victims of airline crashes more fully than the other alternatives we considered.

If no international agreement governed an airline's liability, many airlines might be sued for full damages in U.S. courts. But U.S. courts have not fully compensated victims of airline crashes in the past. According to the Rand Corp., compensation was generally only 39 percent of the actual economic losses.[9] The amount of compensation for economic losses governed by the Warsaw Convention was even lower. While American claimants under the Warsaw Convention received on average about $200,000 in total compensation for aviation accidents between 1970 and 1982, American claimants under the domestic system of compensation received on average about $490,000. As the study concluded, the uncertainty of the results of litigation was one factor encouraging victims or their survivors to accept compensation that was less than the value of their true losses.

Protocol No. 3 and the proposed supplemental compensation plan should improve the level of compensation for three reasons. First, in comparison with the Warsaw Convention and the Montreal agreement, the protocol raises an airline's liability limit from $10,000 and $75,000, respectively, to about $130,000. Second, the supplemental compensation plan provides a maximum of $500 million per aircraft for each accident to compensate claimants. This $500 million limit exceeds the largest payout for airline disasters involving a single aircraft to date.[10] Third, unlike the Warsaw

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[8] The protocol requires that an airline pay the legal expenses of a claimant if, within 6 months of receiving written notice of the claim, the airline does not make a settlement offer that is at least equal to the final compensation awarded by a court. The plan requires that the contractor pay the legal expenses of the claimant if the contractor does not make a reasonable settlement offer within 90 days of whichever of the following occur later: (1) the contractor receiving a notice of the claim or (2) the airline making payment equal to its limit of liability.

[9] King, Elizabeth M., and Smith, James P., *Economic Loss and Compensation in Aviation Accidents*, Rand Corp., The Institute for Civil Justice, 1988.

[10] Japan AirLines and Boeing paid $400 million in total compensation for the 500 victims of a Boeing 747 crash in Japan. Northwest Airlines paid about $200 million in total compensation for an airplane crash in Detroit.

Convention or the legal system that would govern compensation if the United States were to denounce the convention, the protocol eliminates the need to show willful misconduct or fault on the part of the airline, thus reducing both the costs and the uncertainty of litigation.

TIMELINESS OF COMPENSATION

Settling airline accident cases can take a long time. According to the Rand Corp., the average case required more than 2 years to settle and cases that went to trial averaged 4.5 years.[11] Lawsuits were filed in almost two-thirds of the cases. Some cases take considerably longer. Litigation for willful misconduct cases that have gone to trial in U.S. courts has taken on the average about 7 years. For example, the case resulting from the shootdown of KAL Flight 007 has been in litigation for more than 6 years. A representative of the plaintiffs in this case estimated it may take about 10 years to recover damages.

The protocol and the proposed plan would provide compensation more expeditiously because people claiming damages will be required to prove only losses that they suffered. They will not have to prove that the airline was at fault. In contrast, under either the current Warsaw Convention or the legal system that would prevail if we denounced the convention, litigation of fault and damages would still be necessary in many cases. In addition, because the settlement inducement provisions force the airline and the contractor of the supplemental compensation plan to pay the claimant's legal expenses if they do not make settlement offers that are prompt and reasonable, they have an incentive to settle claims quickly.

COSTS OF SECURING COMPENSATION

Under the protocol and the supplemental compensation plan, the costs of securing compensation would be lower than they are under the Warsaw Convention and lower than they would be if no international agreement were in effect. The drafters of the plan recently estimated that the surcharge would be around $3 per ticket. This is considerably less than the $10 travelers can pay today for the more limited coverage of $300,000 under an individual flight insurance policy that can be purchased at U.S. airports.

Because victims and their survivors would not have to prove airline fault under Protocol No. 3, they would not incur the financial costs associated with the civil litigation of fault. According to the research by the Rand Corp., about 20 percent of the compensation paid to victims of airline accidents was absorbed by the costs of litigation; the most common attorney's contingency fee is about 15 to 25 percent of total compensation. Under the protocol and the supplemental compensation plan, litigation for damages would still be necessary if the parties cannot agree on the amount of compensation.

LIKELIHOOD OF GAINING JURISDICTION IN A U.S. COURT

When plaintiffs are dissatisfied with the compensation offered by the airline or the contractor of the supplemental compensation plan, they can file suit to win more acceptable compensation. Legal experts argue that Americans are usually better off if their cases are tried in U.S. courts applying U.S. domestic law. Under the current Warsaw Convention rules, Americans flying between two foreign countries on a foreign airline might be unable to secure U.S. jurisdiction because the convention limits the options where a suit for damages can be filed. That is, Americans might find it difficult to gain U.S. jurisdiction if the accident involving a foreign airline occurred abroad because the requisite contacts between the foreign airline and the United States upon which jurisdiction is established may be absent. If the United States withdrew from the Warsaw Convention, most, but not all, Americans would be able to gain access to U.S. courts and law.

Because Protocol No. 3 gives claimants the right to bring suits in the courts of their countries if the airline has an establishment there, most, but not all, Americans will be able to gain access to U.S. courts and have their damage awards decided under U.S. law. If Americans file suit against the contractor of the plan, the plan guarantees all of them access to U.S. courts and law.

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[11] Kakalik, James S.; King, Elizabeth M.; Traynor, Michael; Ebener, Patricia A.; and Picus, Larry, *Costs and Compensation Paid in Aviation Accident Litigation*, Rand Corp., The Institute for Civil Justice, 1988.

AIRLINE SAFETY

Airline safety is of paramount importance to passengers. Opponents of Protocol No. 3 have contended that removing the litigation of fault from the compensation process would reduce the incentive for airlines to operate safely. Opponents have also suggested that eliminating the civil litigation of fault would remove a major mechanism for uncovering facts about airline safety practices.

The domestic tort system of compensation has not affected airline safety because it has not provided a financial incentive to affect airline safety practices, according to the Rand Corp. The compensation paid by airlines has been covered by liability insurance, the premiums for which represent an insignificant portion of an airline's operating costs. According to an International Chamber of Commerce study of the Warsaw Convention, liability insurance costs were only about two-tenths of 1 percent of airlines' operating revenues over a recent 10-year period.[12] Changes in premiums due to changes in liability limits would likely be too small to affect airline safety practices.

A number of parties are involved in promoting aviation safety, including the airlines themselves. According to the Rand Corp., market forces and Government regulatory agencies are the important determinants of airline safety. Market forces have a major impact on airline safety because an accident can significantly hurt airline revenues. A recent study by researchers at the Center for Policy Studies at Clemson University found that an airline suffers significantly lower stock prices following a serious accident in which the initial investigations of safety officials indicate that the airline is at fault.[13] The Clemson researchers traced the fall in stock prices to the expectation that airline profits would decline due to a drop in consumer demand and to higher insurance costs. The expected changes in demand were found to be a greater factor than the increase in insurance costs. According to the chairman of Pan Am, the destruction of PanAm Flight 103 in December 1988 was the principal cause of a $248 million increase in Pan Am Corporation's operating loss in 1989.

Throughout the world, government agencies have primary responsibility for regulating and overseeing airline operations and safety practices. In the United States, the Federal Aviation Administration (FAA) and the National Transportation Safety Board (NTSB) have considerable influence over an airline's safety practices through their regulations, oversight, and investigations. FAA has a variety of ways to enforce its safety regulations. FAA can amend, suspend, and revoke certificates; levy civil and criminal penalties; and seize aircraft. The combination of safety regulations, oversight, investigations, and sanctions provides a major incentive for an airline to operate safely. Moreover, government agencies that investigate aviation accidents not only uncover most of the facts revealed during the civil litigation of fault but they also make them public. In some cases, facts uncovered through the discovery process during the civil litigation of fault are not made public because, as part of the agreements settling cases before trial, the records are sealed.

According to the Presidential Commission on Aviation Security and Terrorism, which recently supported the ratification of Protocol No. 3, the U.S. Government should strengthen current regulatory enforcement mechanisms to ensure airline accountability for safety violations, notwithstanding the powerful market forces that ought to deter unsafe or reckless conduct by the airlines.[14] We believe that the Commission is right to emphasize that Government agencies be responsible for ensuring aviation safety. We do not believe that victims of aviation accidents should bear this burden while trying to secure compensation.

LIABILITY LIMIT DOES NOT JUSTIFY REJECTING PROTOCOL NO. 3

Although Protocol No. 3 limits an airline's liability, we do not believe that this situation by itself justifies rejecting Protocol No. 3 and the supplemental compensation plan, given the benefits that they would provide to Americans claiming damages in international aviation accidents. If the United States does not ratify the protocol and continues to be a party to the Warsaw Convention, the convention will continue to impose a heavy burden in terms of cost and time on American claimants. Furthermore, if the protocol goes into effect without the U.S. participation, many Americans traveling on foreign airlines between countries that have ratified

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[12] Brise, 5., *Study on the Status and Future of the Warsaw System*, International Chamber of Commerce, 1988.

[13] Mitchell, M.L., and Maloney, M.T., "Crises in the Cockpit? The Role of Market Forces in Promoting Air Travel Safety." *Journal of Law and Economics*, Vol. 32 (Oct. 1989), pp.329–355.

[14] *Report to the President by the President's Commission on Aviation Security and Terrorism*, Washington, DC, May 15, 1990.

the protocol would be subject to an unbreakable limit on liability. In the absence of adequate foreign plans for supplemental compensation, this limit would usually provide considerably less compensation to American victims of an aviation accident.

If the United States withdraws from the Warsaw Convention altogether, some Americans flying on foreign airlines between two foreign countries might not secure full compensation because they might be unable to obtain jurisdiction in U.S. courts or the application of U.S. law. If Americans were to secure jurisdiction and the application of U.S. law, they would still have to prove fault before litigating for damages. Proving fault can be a lengthy, difficult, and expensive process, particularly when the accident site is overseas or little evidence exists. In international aviation accidents that are the result of terrorist acts or unknown causes, proving an airline's fault may not even be possible.

Protocol No. 3 raises an airline's liability limit to 100,000 SDR's per passenger, but because this limit was set in 1975, its value has been eroded by inflation. To avoid complicating the ratification process, ICAO policy holds that this limit should be increased after the protocol enters into force. We believe that this limit should be raised to reflect its loss of value due to inflation, as well as to increase the real value of airlines' liability. Raising the limit would not affect the total compensation paid to claimants in the aggregate; it would increase only the relative amount of compensation paid by the airlines. Thus, the Government should immediately seek to negotiate an increase in the liability limit. This objective could be accomplished by calling for an international conference under the auspices of ICAO. The Presidential Commission on Aviation Security and Terrorism has also stated that, following ratification of Protocol No. 3, the U.S. Government should commence a diplomatic initiative to increase the limit on airline liability.

In summary, we believe that Protocol No. 3 and the proposed supplemental compensation plan offer a reasonable solution for Americans seeking full compensation for damages suffered in international air travel. The proposed supplemental compensation plan addresses the main objections raised in the past regarding the level of compensation provided by previous versions of the plan. The protocol and the plan also provide a framework within which to increase the liability of the airlines and to amend liability rules as necessary. Finally, the protocol is unlikely to affect adversely the safety of international air travel.

Mr. Chairman, that concludes my statement. I would be happy to answer any questions you might have.

Senator BIDEN [presiding]. The chairman has some questions, as do I. He has stepped out just for a moment and will be back any second now. I think I should forgo my questions until he has had an opportunity to ask his. So, we will recess just for a couple of minutes until he comes in. don't want to begin on mine before he has asked his.

[A brief recess was taken.]

The CHAIRMAN [presiding]. Mr. Mead, I thank you very much, indeed, for your presentation.

Would you give us just a brief idea of how many people were engaged in the GAO study, how long it took, and how many interviews were conducted.

Mr. MEAD. Well, you see in front of you most of the GAO team. That number is about six.

Mr. Tapia-Videla will talk about the methodology that we used and the number of interviews that we did, and so on.

Mr. TAPIA-VIDELA. Good morning, Mr. Chairman.

The CHAIRMAN. Good morning, Mr. Tapia Videla.

Mr. TAPIA-VIDELA. We interviewed public officials in the Departments of Transportation, State, and Justice. We interviewed private officials in international associations, such as IATA in Washington, DC, and the International Civil Aviation Organization in Montreal, Canada. We interviewed people at the Air Transport Association of America. In New York City, we interviewed represent-

atives of the two largest aviation insurance companies in the United States.

We reviewed the available studies and empirical evidence on settlement data. We are relying in part on a Rand study that deals with aviation litigation and the implications of litigation on aviation safety.

We rely on the Clemson study and other studies to look at the market impacts on airlines.

The CHAIRMAN. Good. But how many interviews did you conduct, roughly?

Mr. TAPIA-VIDELA. In a period of about 3 months, we interviewed about 25 different groups, and we covered the whole gamut, the whole spectrum, of potential witnesses that could come here. We interviewed people who have testified before you in the past. We talked to American trial lawyers, both here in Washington and in New York. We talked to both opponents and supporters of the protocol.

Mr. MEAD. I think the only one he did not mention, Mr. Chairman, was Lloyds of London, other large British aviation underwriters, and the EEC in Brussels, Belgium.

The CHAIRMAN. Thank you.

Mr. Mead, I am glad that you focused on the question of airline safety because that has been, really, one of the most significant objections raised in opposition to the protocols. The opponents have maintained that only unlimited liability would constitute a positive incentive to promote and improve better safety practices, and that therefore, the protocols would create a disincentive to safety. You cited several studies which refute this contention. One is the Rand study, which you indicate concluded that it is not the risk of liability but market forces that have more of an impact on safety.

Would you tell us a little bit what you mean by that? Do you feel that market forces themselves will make for a more safe environment when flying?

Mr. MEAD. Market forces are a very critical determinant of airline safety. People sometimes focus on liability awards and say well, the mere threat of a liability award as a result of an accident is going to be an incentive or have a deterrent or therapeutic effect on safety. But, in fact, the market forces attendant to the loss of an aircraft are very important. For example, replacing a 747 will cost you between $120 and $160 million. The revenue producing potential of a 747 during a year, a plane that is not readily replaced, is extraordinary to the airline. So, it is not as though there are no other market forces at play in the industry.

There is also the question of an airline's reputation. For example, after the PanAm crash at Lockerbie, PanAm experienced, I believe, a 20-percent reduction in operating revenue, somewhere in that neighborhood. But that has nothing to do with the lawsuits. I don't know if the lawsuits were yet filed when the passenger usage of PanAm dropped off after the accident. Jack is fluent on the Rand study and the Clemson study and might give a fuller exposition of my response.

Mr. WELLS. The important point to remember in looking at the safety impact of tort damage awards is that the tort damage

awards are insured. And so, they are paid for not directly by the airline itself but by the airline's insurer.

If the airline's insurance premiums increase dramatically as a result of the airline having an accident which was the airline's fault, then you might still argue that tort damage awards did impose a cost upon the airline and did provide some incentive for the airline to conduct its operations more safely.

But in fact, the increase in insurance premiums following an airplane accident seemed to be the same pretty much, regardless of whether the airline was at fault or not. The Clemson study that Mr. Mead referred to earlier is the only study that actually has looked at changes in insurance premiums resulting from airline accidents. There was no statistically significant difference between the increases resulting from at-fault accidents and the increases resulting from accidents that were not the airline's fault.

So, there really is not a mechanism there for the burden of the tort damage awards to be loaded back on to the airline. In fact, they are generally shared relatively equally among all the airlines in the industry, so that no one single airline bears the burden of any unsafe operating practices that it might engage in.

The CHAIRMAN. Thank you.

I have another question on a separate subject.

The supplemental compensation plan provides for a total compensation of up to $500 million per aircraft for each accident. You note in your statement that this would exceed the largest payout for airline disasters involving a single aircraft to date.

Do you think that a ceiling, an arbitrary ceiling like this, is adequate for all future possibilities? If nothing else, you will have inflation at roughly 5 percent a year. Should it be in any way indexed, do you think?

Mr. MEAD. Yes, I think it should be.

In fact, while $500 million today is clearly in the ball park—that is, it exceeds the highest payout for any airline disaster in the world—it should be flexible, because awards for damages will increase over time.

There are provisions made for that. The $500 million in the special compensation plan is described now as a floor. So, yes, it should adjust upward.

The CHAIRMAN. Thank you very much.

I will now turn to the Senator from Delaware.

We have no 10-minute limit as you and I are the only people here.

Senator BIDEN. Thank you, Mr. Chairman.

Mr. Mead, or any of your colleagues, why should the airlines receive this protection?

Limit your response to that and not whether or not it is good for passengers, bad for passengers, whether it facilitates recovery, it slows recovery, whether or not it, on balance, has total recoveries as more or less.

Is there a reason why the airline industry needs this protection?

Mr. MEAD. Certainly not in the United States. There is no intrinsic justification for the limits on liability. I think all the U.S. carriers would tell you that. The limit is the practical outcome of dealing on an level in international negotiations.

Senator BIDEN. A practical outcome. What is the practical outcome for the airlines, not the passengers, but for the American airlines? What is the practical outcome? Why is it, then, that, first, they do not need it domestically? There is no rationale saying that this should apply to this any more than to railroads or automobile accidents or anything else in other countries. What are the practical reasons why it makes sense, then, for American airlines—not passengers, but for American airlines—for the international airline system?

This is what they call in this business, as you know, a "soft ball." Explain to me why the international airline industry—not the passengers, but the industry—needs the Montreal protocols or the Warsaw agreement to begin with?

Mr. WELLS. Well, I think for the most part they do not. I think there may be a handful of small airlines in small countries that are poorly capitalized and that would face some risk of becoming insolvent if they were hit with a large liability suit. They may have more difficulty getting aviation insurance than larger airlines.

But, for the most part, international airlines, like U.S. domestic airlines, are able to get aviation liability insurance and, from our point of view, they do not need this.

As it happens, however, they or their governments have insisted upon it.

Senator BIDEN. I'm sorry. Would you repeat that?

Mr. WELLS. As a practical matter, they, or their governments, have insisted upon this limitation on liability and if we want any kind of international agreement to try to resolve issues like conflicts of law, then we, in effect, have to buy into this agreement.

But we would basically agree with you that there is no intrinsic justification for the limitation on liability.

Senator BIDEN. Why do you think the airlines feel so strongly about this thing? Is it because they have an overwhelming concern for their passengers? Do you think that is the reason?

Would you all speculate for me why the industry, the airline industry, thinks this is so critical. Why do you think that is?

Is this a new-found benefit of capitalism that we have not observed in other markets? Can you tell me why this is such a high priority for them?

Mr. WELLS. The airlines have a vested interest in getting on the board a uniform system of compensation protection.

Senator BIDEN. What is a vested interest? I mean, what is vested? What interest is vested?

Mr. MEAD. For 15 years, actually, even longer than that, we have been talking about how are we going to compensate victims of accidents satisfactorily. The airlines have been involved, obviously, in those discussions. I think everybody is of the view now, especially with the KAL and PanAm experience, that it is time to move on, that it is time, finally, to do some things for the victims.

Senator BIDEN. Wait a minute. Do you think that is what is moving the airlines?

Mr. MEAD. I think that is one of the factors.

Senator BIDEN. I have a piece of land that I would like to sell you. I'd like to talk to you about it.

Mr. MEAD. All right.

Senator BIDEN. Look, the whole rationale for this in the first instance was to make sure that airlines remain solvent. That's how we got into this business in the first place.

It is not, in my view, a bad thing that airlines, although concerned about the safety of their passengers, should not be overwhelmingly consumed by making sure the recovery of their passengers in damage situations is what the passenger may think it is, or should be. Every industry is the same way. All of us are the same. It is the nature of the way we work.

The only point I want to make is this. I would like to divide this into two pieces. First: passengers speaking for themselves may or may not think this is a good deal. I kind of wonder whether or not, if there were a referendum on every person who purchased a ticket on an international flight and 20 million are purchased every year—I wonder how many Americans, as they purchased the ticket, said "Aha, you can sign up now, basically for no fault, limiting you to a recovery of $130,000 with certain circumstances, and domestically you can get more." Or, you just go in and, just like every other deal that occurs, when there is negligence, you sign on that way, and your liability, the airline's, can be extremely higher. It's harder for you to prove it, but it can be higher.

I wonder if we left it up to the passengers what they would do. I don't think you know the answer. I honestly don't know the answer. They may sign up and say, you know, just assure that my wife gets $130,000 if I go down, or if I go down, make it possible for my wife to collect $1, $2, $7, $19 million—whatever my value is, as determined by a court.

So, I find it somewhat disingenuous. We all speak for the passenger. The most significant example of being disingenuous is when I hear the airline speak for the passenger.

The rationale for this in the first place was to protect airlines. That's how we got in this business. We wouldn't even have been involved were that not the case.

Now that is fine. That's OK. There is nothing wrong with it.

So, I find it, I think it is, if I were standing before a jury, I would make the case that, although I cannot prove a direct connection, I do find it somewhat interesting that the airlines put this at the top of their list as a thing beyond total limited liability domestically—they like that one. But fortunately that has to go through my committee, the Judiciary Committee.

Tort reform, I always find that fascinating. Other than tort reform domestically, this is right up there. I find it kind of interesting that they find it so important, if it were not something that benefited them from their perspective significantly. That is No. 1.

Now let me shift over from their interest, their concern, to talk a little bit about the passenger and what impact this does or does not have on the passenger.

Since I think we would all stipulate at the outset that we don't know what the passenger would do, given the opportunity to vote—or maybe you all do, but I don't know of any way, of anything other than your instinct versus my instinct as to what they would do—that is probably not a very fruitful undertaking.

In your testimony, you stated that if the United States withdrew from the Warsaw Pact—the Warsaw Pact, I mean the Warsaw

Convention. I'd like to see happen to the Warsaw Convention what happened to the Warsaw Pact. I would like to see it dissolve. But we are talking about the Warsaw Convention.

You say, "Americans might find it difficult to gain U.S. jurisdiction if the accident involving a foreign airline occurred abroad." That is the end of your quote.

Did you or your office survey the airlines of the world to determine if the United States were to renounce the convention, which airlines an American plaintiff could serve in the United States and which they could not? Do you have any idea?

Mr. MEAD. We did not do a survey of that nature.

Senator BIDEN. It's kind of important, though, to be able to sustain that statement; isn't it?

Let me read the statement again: "Americans might find it difficult to gain U.S. jurisdiction if the accident involving a foreign airline occurred abroad."

Mr. WELLS. This is under the circumstances of denouncing the Warsaw Convention or under the current Warsaw Convention?

Senator BIDEN. No, this is your statement. You are saying if we withdrew from the Warsaw Convention——

Mr. WELLS. If we denounced it?

Senator BIDEN [continuing]. If we denounced it, we might find it difficult, an American passenger involved in an accident abroad might find it difficult to gain jurisdiction to sue.

I'm asking, in order to make that judgment about how difficult that would be or would not be, you would, I assume, have done or someone else did a survey of the international airlines to determine whether or not we could, an American passenger could get jurisdiction over that airline in the United States.

Mr. MEAD. First of all, this would not be an American airline.

Senator BIDEN. No. I said an American passenger, not an American airline.

Mr. MEAD. An American passenger on a foreign airline——

Senator BIDEN. Right.

Mr. MEAD [continuing]. I'm not sure that I would ask an American airline about the jurisdiction.

Senator BIDEN. But I'm not talking about an American airline.

Mr. MEAD. Whether they could sue would be a function of the domestic tort system.

Senator BIDEN. To an American flying on a foreign airline going from one foreign country to another foreign country, you are implying that that American, who is injured and/or killed, that he or his family would not be able to get jurisdiction over the airline in the United States. That's what your statement implies, or am I reading it wrong?

Mr. HOOPER. I think the general rule that we found is that there would be a minimum contacts question——

Senator BIDEN. Right.

Mr. HOOPER [continuing]. And whether there is a ticket office in the United States which could be sued.

Senator BIDEN. Right.

Mr. HOOPER. We did not do a survey finding which airlines had ticket offices and which did not. But in cases where the airlines did

not have a ticket office here, there would probably be a problem finding jurisdiction.

Senator BIDEN. Well, how about the fact that those very airlines that purchase American parts for the vast majority of the planes that they fly in, that they purchase—and correct me if I am wrong—these are American planes.

In other words, what I am trying to get at is the percentage. We are all implying here and we all acknowledge that there are tradeoffs. We are trading off genuine recovery versus speed and certainty of recovery. We are trading off amounts of recovery versus access and certainty. We are trading off in this case, if we withdrew, staying in the protocols. We are trading off the limitations that that implies, and that we all acknowledge are real and genuine and not something some whacko plaintiff lawyer is just ginning up. We all can acknowledge tens of cases where the recovery, where by anybody's standard, would be and should be above $75,000, or now $130,000. No one is arguing that. So, we are trading off.

What I am trying to get at is this. Let's assume that we knew that roughly 20 million Americans buy a ticket on a foreign airline, or they fly abroad, or they fly intra-European. Let's assume that for the sake of discussion we know that, though we don't know. But let's assume that only 1 percent of all those American passengers who fly flew on an airline over which the United States could not gain jurisdiction. Then we might say "Hey, wait a minute. The tradeoff here is this 1 percent who does not get jurisdiction versus the 99 percent who may get significantly higher 40 compensation." Maybe that is a tradeoff that we should make, a rational decision. We're in the business of making, hopefully, rational decisions.

And so, in order to make that decision, it seems to me that one has to have some notion of what number of airlines in the world that fly out of their country, qualifying as a foreign airline, flying to a foreign destination, what number of them we would not be able to get jurisdiction over.

Mr. MEAD. We would be unable to make that judgment in advance.

Senator BIDEN. How is that?

Let's assume for the sake of discussion—I'm probably wrong, but help me out here and educate me—let's assume there are a totality of 100 airlines in the world, though there are many, many more.

For the sake of this discussion, let's make it 100,000 airlines, if that helps you more. Let's assume there are 100,000 airlines that fly from the place where they are domiciled beyond the border of the country in which they are domiciled. They are consequently covered by this provision.

Now, among those 100,000, there are certain things we would know for certain, that we'd know right off the bat. You could just open up a phone book and find out that 50,000 of them had ticket offices in the United States. Bingo, you'd have 50,000 of them covered.

Mr. MEAD. A ticket office does not necessarily guarantee jurisdiction in U.S. courts.

Senator BIDEN. But it is awfully close. Awfully close.

Mr. TAPIA-VIDELA. In a world without an international treaty, countries unilaterally could impose limits on their own airlines, in terms of the recoveries they are going to provide.

Senator BIDEN. Sure they could. But very few countries do not want to have a shot at being able to fly into the "Big Banana."

Mr. TAPIA-VIDELA. That's an assumption on your part, Senator.

Senator BIDEN. Yes, and I think it is a rational one. Tell me why that is not a rational assumption.

Mr. MEAD. It is a rational assumption. But it is an equally rational assumption that the United States at the present time is trying to get many more landing rights in Europe, and Europe, at the present time, is trying to get some rights in the United States. The EC people are trying to draft a common supplemental compensation plan for all of their carriers.

Senator BIDEN. Correct.

Mr. MEAD. I'd like to come back to the jurisdictional issue. The jurisdictional issue is one tier, but there is a subsidiary tier that deals with which law you are going to apply. I have one or two stories that I would like to share with you where the U.S. courts applied foreign law——

Senator BIDEN. As long as I can share my anecdotal stories with you as well.

Mr. MEAD. Certainly.

I would also like to come back to that land you wanted to sell me if we have a chance this morning.

Senator BIDEN. It's not in Delaware. All the land in Delaware is good land.

Mr. MEAD. David, could you share with Senator Biden the story, that case where the plaintiff did get jurisdiction in the U.S. courts and there was no international agreement.

Mr. HOOPER. I think there are several cases involved. One was a case back in 1965, where the situation involved two planes, one a Brazilian plane and one a U.S. naval plane, that crashed over Brazil. The case was brought in U.S. courts by the family of a naval officer. The court decided that because the crash occurred in Brazil, because there was a Brazilian airline involved and the Brazilian airline was a defendant, and most of the circumstances pointed to Brazil, that Brazilian law would be applied.

The Brazilian law in this case was a wrongful death statute, which stated that the maximum you could recover would be $170.

Now, I must qualify that and say this is not a Warsaw case because the person who sued was suing the plane that he did not have a ticket on. So, the Warsaw situation did not come into effect.

Senator BIDEN. He was suing the U.S. Air Force, or the Navy?

Mr. HOOPER. No. He was suing the Brazilian airline. He was flying on the naval airplane.

Senator BIDEN. I see.

Mr. HOOPER. The other situation involved a Chinese flight that crashed between Nanking and Beijing. Warsaw did not apply in that case either because it was a domestic flight within China. The court said because of the circumstances of the crash, because it was a Chinese airline involved and it occurred in China, that the Chinese wrongful death statute would apply. In that case, their wrong-

ful death statute mirrored the Hague protocol, which put a $20,000 limitation on the recovery.

It is difficult to find situations that are outside the Warsaw regime only because we have been under Warsaw for this whole period. But I do think they are indicative of the situations that could occur if we denounced Warsaw and you had to look at certain conflicts of laws questions, given the particular circumstances of the accident involved.

Senator BIDEN. I don't doubt that a bit, and I'll bet you if this were a game show and I gave you 10 seconds, you could name me twice as many, four cases, where the result for American passengers would be significantly better than what was under Warsaw; couldn't you?

Mr. HOOPER. In which situation?

Senator BIDEN. In any situation. Just name me four cases where, if there were not Warsaw, the American passengers would have been significantly better off.

Mr. MEAD. Oh, sure.

Senator BIDEN. Rather than do it, we could just trade off examples.

Mr. HOOPER. Yes. I could also point out many possible situations where they would be worse if we did not ratify Montreal.

Senator BIDEN. Are you guys telling me, on the record, that you believe that, on balance, more American passengers would be prejudiced if there were no Warsaw than would be prejudiced if there were a Warsaw? In other words, are you all going to say that on the record for me? I would like to hear that one.

Are you going to tell me, on the record, that if there were no Warsaw, there are more American passengers who would be at a disadvantage than those who would benefit from there being a no Warsaw?

Mr. FITZGERALD. Senator, I think your point is well taken. I think this discussion shows that there is quite a variety of cases that have come up and can come up. I think the point is, while there may be many more people who would be advantaged without Warsaw than disadvantaged, we would be basically dealing with a system where there was no assurance of equity in any given circumstance between people who happened to crash on a particular airline in a particular country.

Senator BIDEN. You see, that is my concern: equity. When I look at your chart, I do not see equity there. The very chart that you show points out to me that you illustrate very graphically the lack of equity.

Does it not illustrate perfectly the impact of the treaty limits on liability, the very chart you have up there?

Mr. MEAD. Yes, it does.

Mr. WELLS. But that inequity would continue if we denounced Warsaw. You are certainly correct that, it is relatively easy to get jurisdiction in U.S. courts under a non-Warsaw regime, but it is not as easy to get the application of U.S. law, and if you are unable to get the application of U.S. law, you might be covered by the kind of restriction on recoveries that David mentioned.

Senator BIDEN. One of the things that I think would be a useful thing—and maybe the study has been done—would be to do just

that, to study the cases that have been studied for other purposes, to determine whether or not, if there were no Warsaw, whether, first, it is clear the recoveries would have been greater, and, second, whether there would have been the applicability of U.S. law, U.S. jurisdiction, and U.S. law. I don't know the answer to that question. Maybe you all do.

Have there been any such studies done, like the Rand study or any other study along those lines?

Mr. MEAD. No.

Senator BIDEN. We have heard testimony in this committee from experts from the plaintiff's bar that, absent the Warsaw Convention limits, virtually all defendant airlines would be served in U.S. courts. This is why I raised the issue here. You are making the case, even if they would be able to be served in U.S. court, able to be served in the United States, subject to the U.S. courts, this does not answer the question whether or not they would be subject to U.S. law.

Under the supplemental compensation plan, the airlines would no longer pay insurance premiums for Warsaw ticket risks. Instead, they would collect insurance premiums from the passengers.

The result is that the passenger would be paying his or her insurance coverage even in the case of an air crash caused by deliberate negligence on the part of the airline.

Is that correct?

Mr. WELLS. I would say, sir, that currently the airlines are collecting the costs of their insurance premiums from airline passengers already in the form of the price of the ticket.

Senator BIDEN. This is really no different, making an explicit charge for that?

Mr. WELLS. That would be our expectation. Yes.

Senator BIDEN. Well, it is kind of interesting that the cost of business is always included. One of the costs of doing business is insurance. So, your response would be the fact that now it is just a more explicit reference to it.

Mr. TAPIA-VIDELA. In addition, it's a different type of benefit. In the current system, you are buying fault insurance. Under the plan, you would be buying no-fault insurance. Those are dramatically different packages for the consumer.

Senator BIDEN. Uh-huh.

What is the legal underpinning for the supplemental compensation plan, what you understand would be an agreement between the carrier and an insurance company?

Mr. MEAD. That's correct—not just one carrier, but all the carriers.

Senator BIDEN. Did I say "carrier"? I meant to say "air carriers."

Mr. MEAD. I might have misunderstood.

Senator BIDEN. I probably said it incorrectly.

Mr. MEAD. The treaty protocols would authorize member states to have a supplemental compensation plan, so that the United States would have a supplemental compensation plan that could well be materially different from the German supplemental compensation plan. There would be different compensation plans all over the world. That is the basic legal underpinning.

Also, I think the carriers needed an antitrust exemption so they could get together and work some of these issues through.

Senator BIDEN. What is the legal underpinning for it? I mean, we're talking about all carriers, not just all U.S. carriers; correct?

Mr. MEAD. [Nods affirmatively.]

Mr. WELLS. All carriers serving the United States.

Senator BIDEN. Serving the United States, yes, but not all U.S. carriers. All carriers serving the United States would be required, or would they have the opportunity, to add a surcharge on to the cost of the ticket, which, as you point out, they are already doing to cover the cost of their insurance premiums?

Mr. MEAD. They would have no choice. On U.S. departures, foreign carriers or American carriers departing from the United States, there would be no choice, whether or not they had originally signed this special compensation plan.

Senator BIDEN. What is the legal underpinning for that? I mean, is that an automatic right that we have that is not affected? Or is it?

In other words, like a landing fee, can we just now, under American law, require all carriers who land in and depart from the United States carrying passengers to provide for a contribution to this fund? What is the legal basis for that?

Mr. MEAD. Marty.

Mr. FITZGERALD. You're going, obviously, beyond the question of whether this is authorized to be imposed under the terms of the protocol.

Senator BIDEN. Correct.

Mr. FITZGERALD. I'm having a little difficulty because of problems of receptivity on my part here in understanding your question.

Are you questioning whether the Department of Transportation has the authority to require it as a condition of doing business?

Senator BIDEN. Yes.

Mr. FITZGERALD. Under this protocol, if ratified, would it have the authority?

Senator BIDEN. Either way. From whence does the authority derive?

Mr. FITZGERALD. As a treaty, as a ratified treaty, it would be the law of the United States; and, as a U.S. Government agency, the Department of Transportation would be authorized to effectuate the law of the United States, to implement the law of the United States, by any means that are either explicitly or implicitly authorized by that law. Beyond that, I don't think I can speak right at the moment. Perhaps we could supply something for the record further on that, if you wish.

Senator BIDEN. OK.

[The information referred to follows:]

WRITTEN RESPONSE FILED BY THE GAO

Under Article II, Section 2 of the U.S. Constitution, the President has the power, "by and with the advice and consent of Congress, to make treaties, provided two-thirds of the Senators present concur." Article VI of the Constitution states that treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are the supreme law of the land.

Pursuant to this treatymaking power the executive branch participated in the negotiation of the Montreal protocols which included a provision which recognized a state's ability to establish within its territory a system to supplement compensation available under the Warsaw Convention. The executive branch's actions in connection with devising a U.S. version of a supplemental compensation plan follow from Article II, Section 3, of the Constitution which states the Executive "shall take care that the Laws be faithfully executed."

As for the statutory underpinnings of the supplemental compensation plan, they parallel those supporting the Montreal agreement, CAB Agreement 18900, May 13, 1966. The Montreal agreement was put in place pursuant to Sections 401 and 402 of the Federal Aviation Act, P.L. 85–726. These sections require U.S. and foreign airlines to obtain a permit issued by the Secretary of Transportation to engage in interstate, overseas, or foreign air transportation. Both sections empower the Secretary of Transportation to issue a permit if it finds the applicant "fit, willing, and able to perform" its designated transportation properly.

The Department of Transportation has used this permit power under 14 CFR part 205 to require that no U.S. or foreign direct airline shall engage in air transportation to, from, or within the United States unless it has satisfactory aircraft accident liability insurance coverage. Similar regulations would be used to implement a supplemental compensation plan. The plan would be put in place subject to the approval of the Secretary of Transportation pursuant to the above constitutional and statutory provisions.

Senator BIDEN. Could the airlines later renegotiate this agreement?

Mr. MEAD. Yes, subject to the Department of Transportation oversight, which is an issue. I hope, before we conclude today, we have a number of suggestions, should you go forward with this ratification, dealing with the role of the Department of Transportation.

The Department of Transportation must approve the contract and any renegotiations of that contract.

Senator BIDEN. Could they walk away from it?

Mr. MEAD. No.

Senator BIDEN. That's a treaty obligation.

Mr. MEAD. That is reserved to the Department of Transportation as a specific provision of the supplemental compensation plan.

Senator BIDEN. Let me come back to that.

So, your assertion is that the airlines cannot walk away from that agreement?

Mr. MEAD. No, nor can the Department of Transportation.

Senator BIDEN. Could you supply the language which sustains that assertion?

Mr. MEAD. We could do that for the record.

Senator BIDEN. You don't have to do it now. But please do it for the record.

Mr. MEAD. Yes, certainly.

[The information referred to follows:]

WRITTEN RESPONSE FILED BY THE GAO

Under the express terms of the Montreal protocols, the United States is not required to implement a supplemental compensation plan. The language of article 35A of the protocol is permissive in nature. However, in accordance with the proposed provisos in the resolution of ratification considered by the Senate, the President would be prohibited from depositing the instruments of ratification until he has determined that a satisfactory supplemental compensation plan is in place. Continued adherence by the United States to the Montreal protocols is contingent upon the maintenance of a satisfactory supplemental compensation plan, as approved by the Secretary of Transportation. Under the second Senate proviso, the President is instructed to denounce the protocols if "at any time, he determines that a satisfactory supplemental compensation plan * * * is not in operation for the United States."

The airlines would not be able to ignore their obligations under the supplemental compensation plan, nor would they be free to refuse to participate in the plan. The Department of Transportation would be able to require airline participation in the current plan or in any new plan pursuant to its permit authority under Sections 401 and 402 of the Federal Aviation Act. Please see our written response above as to the legal underpinnings of the plan for a more full explanation of the Department of Transportation's authority.

Senator BIDEN. What is the cost of liability insurance to an airline today per passenger, per international flight? Do we know?

Mr. MEAD. It is roughly 25 cents per 1,000 revenue miles. I believe you will see that figure going up somewhat over the years. It is interesting. In 1986, the premiums were higher than they are now. But in the last 2 or 3 years, the payouts have been increasing to the point where there is considerable talk in the community that rate hikes on the way.

Senator BIDEN. What is the estimated cost to the passenger of the supplemental compensation plan, as presently proposed?

Mr. WELLS. Well, the estimate that we have, the best estimate that we have available now, is the $3 estimate that we have in our testimony.

Senator BIDEN. Could you compare apples and apples for me? In other words, you just indicated 25 cents per—what was it you said?

Mr. MEAD. Per thousand revenue miles. You could do different things with the calculation you are suggesting. One could fly to Great Britain, which is approximately 3,000 miles, and the round-trip will cost the consumer about $1.50, which will be passed on to the consumer.

Under the supplemental compensation plan, there would be a $3 charge for a flight of the same distance.

Senator BIDEN. What I am trying to get at is this: I there a significant distance, in comparing apples and apples?

Mr. TAPIA-VIDELA. But they are not apples and apples. That's the problem. When you are buying airline insurance, you are buying fault insurance. Under the plan, it is going to be no-fault insurance. It is two different types of benefits that you are going to be getting. So, the costs of those benefits are different.

Senator BIDEN. Excuse me. But in international flights now, am I buying fault insurance?

Mr. MEAD. They do not distinguish now. They comingle the international in with the domestic.

Senator BIDEN. That's why I asked the question, whether or not the cost of liability insurance of an airline per passenger per international flight. That's my question to you, and I thought you answered me that it was 25 cents per 1,000 miles.

Mr. MEAD. That's international or domestic. There is no difference.

Senator BIDEN. So, you are paying, then 25 cents per 1,000 miles for no-fault——

Mr. TAPIA-VIDELA. For fault insurance.

Senator BIDEN [continuing]. For fault as well as no-fault insurance.

Mr. TAPIA-VIDELA. No, that is under the plan.

Senator BIDEN. Now right now, today, if I get into an airplane and fly to Great Britain, and the plane goes down and I am killed, my family has limited ability to recover for my death; right?

Mr. WELLS. Unless they can prove willful misconduct.

Senator BIDEN. Right.

Mr. WELLS. So, the airline only has to buy enough insurance to cover either up to the limits of the Warsaw Convention or to cover more than that if willful misconduct is shown.

Under the supplemental compensation plan, there would have to be coverage——

Senator BIDEN. You eliminate coverage for misconduct.

Mr. WELLS. That's right, for everybody, whether willful misconduct was shown or not, up to the total amount.

Senator BIDEN. But as a practical matter, a significant portion of that that I am purchasing is essentially no fault because willful misconduct is not often proven? Or has it been, since 1929 or whenever?

Mr. WELLS. But then it is no fault, but only up to the relatively low limits of the Warsaw Convention, the Montreal agreement.

Senator BIDEN. What I am trying to get a sense of is, Is there any way to calculate what we are paying for that no fault now?

Mr. MEAD. No, there is not.

Mr. WELLS. I think the point remains that you are correct that, under the supplemental compensation plan, passengers would be paying more for insurance because they would be getting a higher level of benefits.

Senator BIDEN. What I am trying to get at is whether or not the cost is relative to the benefit that they are going to get, the higher benefit. It seems to me to be, relatively speaking, much higher than the benefit that would be received.

Mr. WELLS. I think it would be very hard. You really couldn't know that until after the plan had been in effect and you had seen what the premiums turned out to be, given the fact that different insurance companies were competing for the role of the contractor. You would have to look over a considerable period of time because the insurance market fluctuates substantially over time and goes through boom and bust periods.

Senator BIDEN. In your testimony, you state: "Drafters of the plan recently estimated that the surcharge would be around $3 per ticket."

But in the March 2 letter to Chairman Pell, the GAO agreed to address the cost of the supplemental compensation plan. Why didn't you estimate the cost, especially now that the plan has been amended to provide both economic and noneconomic damages?

Mr. TAPIA-VIDELA. The problem is that the costs cannot be estimated because the surcharge is going to be determined in a competitive manner. So, the bases for calculating that surcharge are not there. It has not happened yet. We do not have hard, empirical data available for that.

Senator BIDEN. So, we really don't know how much this is going to cost per ticket, do we?

Mr. MEAD. These are judgments of national insurers, international insurers, and air transport associations. Of course, if that $500 million global limit is increased, you could expect an increase in the surcharge.

Senator BIDEN. Well, I guess I am just a cynic. It sounds to me like the airlines are going to be saving some money with this sur-

charge, as estimated now, especially since we all sit around and say that we don't know how to calculate it.

But maybe I am wrong.

In your statement, you compare the estimated cost of the supplemental plan to individual flight insurance that you can buy at the airport, which you estimate at $10,000 to $300,000 of coverage.

Did you know that if you buy an international ticket with an American Express Card, you are automatically covered for $100,000 for travel life insurance and that for just $4, I can buy an additional $250,000 in coverage? I assume your answer is that that is fault and we are talking no fault, so you are paying the higher premium for no fault?

Would that be the answer?

Mr. MEAD. No. American Express—I have mine in front of me, too--for $14, I can get 1 million dollars' worth of coverage, and I assume that American Express is going to pay whether the airline was at fault or not. I certainly hope so.

Senator BIDEN. So, for $14, you can get $1 million coverage.

Mr. MEAD. That's correct. Right.

Senator BIDEN. And for the estimated $3, how much are you going to get?

Mr. MEAD. Unlimited.

Senator BIDEN. Unlimited.

Mr. MEAD. If your damages were $10 million, then you will get $10 million for the $3 fee.

Just to clarify, I have been told--both you and I were using American Express in this example—it is important to caveat the use of American Express because included in our $60 or $70 annual fee is part of the cost of the insurance. So, this is one of the collateral benefits of membership.

I don't know what it costs exactly if you buy it over the counter at the airport.

Senator BIDEN. Mr. Chairman, I have about five more questions, but why don't I submit them in writing and just ask one last one, if I may.

The CHAIRMAN. That will be fine. We are in no hurry.

Senator BIDEN. Thank you.

Your report relied, at least in part, on the 1988 Rand Corp. study for empirical evidence regarding compensation in an aviation accident. The Rand study found that compensation paid by U.S. courts in domestic airline crashes was generally only 39 percent of the actual economic loss, and that the amount of compensation for economic loss governed by the Warsaw Convention was even lower.

Your testimony, I do not believe, I do not think it cited an important conclusion from the Rand study, which I would like to read into the record. It regards the effect of the liability limit imposed by the Warsaw Convention on compensation.

Rand isolates this effect through regression analysis of cases with only a single defendant, the airline, comparing when the passenger has a Warsaw ticket and when he does not. Let me read the quote. "If you compare U.S. decedents who are identical in all ways, including the same loss of $500,000, compensation for an American flying without a treaty ticket is $304,000; whereas an American flying on an effective treaty ticket is $192,000. If the tort

system aims at equity, these limits imposed by international treaties work against that objective." I believe that was "Economic Loss and Compensation in Aviation Accidents," page 92.

Now, would you comment on that for me?

Mr. WELLS. We agree. The presence of liability limits in the Warsaw Convention unfairly limits liability for some passengers, and that is why we would favor the Montreal protocols, which provide for the supplemental compensation plan, which would eliminate those limits on the recovery of those passengers.

Mr. MEAD. Senator Biden.

Senator BIDEN. Yes.

Mr. MEAD. Can I come back to the land you wanted to sell me earlier?

Senator BIDEN. Sure, and I wish I had it to sell it to you. Fire away.

Mr. MEAD. It regards our response to the question of the airlines' motivation. That was one of your initial series of questions.

I should add that over the last 15 to 25 years of negotiations over what compensation system to put into place, the airlines have been operating largely at the direction of the U.S. Government. The U.S. Government has been out there, pushing the interests of the consumer. They have been the moving force. The airlines are involved necessarily because it is their liability and they would have a role in the supplemental compensation plan.

But I think the State Department and the Department of Transportation are the ones that have been out there representing the consumers most directly.

Senator BIDEN. What is your point?

Mr. MEAD. My point is you were saying it seems somewhat ingenuous to point just to the airlines as being interested in making sure that victims of accidents get compensated adequately. I was pointing out that there are other actors involved here, too, that have been negotiating on behalf of consumers for many years.

Senator BIDEN. Oh, I don't disagree with that. I was speaking directly only to the airlines.

Mr. Chairman, I would like to ask unanimous consent that several questions that I have, which I do not have time to ask at the moment, be submitted for a written response, if I may.

The CHAIRMAN. Without objection, and also any other questions that might be submitted by other Members. The record will remain open for them to do so.

I would hope this could be done within the next day or so. We hope to bring this up at our executive meeting on Thursday. Try to get the answers back in time. Otherwise, there would be no possibility of bringing it back up on Thursday.

[The information referred to follows:]

GAO RESPONSES TO QUESTIONS ASKED BY SENATOR JOSEPH BIDEN

BENEFITS OF FAULT-BASED LITIGATION

Question. What weight did GAO give to the benefits of fault-based litigation in discovering the truth about negligence on the part of the airlines? Are you aware that evidence of fault in the airlines' security system has been unearthed by the Lockerbie litigation?

Answer. When addressing the relationship of fault-based litigation and aviation safety, GAO evaluated the capacity of litigation to provide a credible deterrent to unsafe airline practices, as well as its ability to reveal facts related to the causes of accidents that would not otherwise be uncovered by the accident investigations conducted by responsible regulatory agencies. We were not able to demonstrate that fault-based litigation had any clear benefits in discovering the truth about negligence on the part of the airlines.

The available empirical evidence indicates that civil litigation of fault does not, by itself, provide an incentive to affect airline safety practices. Testimonial evidence on this issue is contradictory. Opponents of the Montreal protocols suggest that litigation of fault has a major impact on airline safety. Supporters of the protocols, including a prominent aviation trial lawyer, contend that Protocol No. 3 would not undermine airline safety by eliminating the litigation of fault. The evidence suggests that market and regulatory forces determine airline safety.

In the United States, the National Transportation Safety Board (NTSB), an independent Federal agency, has primary responsibility for determining the probable causes of aviation accidents and for making safety-related recommendations to the Federal Aviation Administration (FAA) and the airline industry. NTSB has access to the same discovery procedures available to plaintiff's lawyers. NTSB's findings and recommendations always become part of the public record. In addition, this agency is frequently involved in investigation of aviation accidents that occur overseas as part of the U.S. obligations to the International Civil Aviation Organization.

Opponents of the protocols argue that the civil litigation of fault is a major mechanism to uncover facts in aviation accidents. Supporters of the protocols, including a prominent aviation trial lawyer, contend that the facts uncovered by the civil litigation of fault are also uncovered by the government agencies responsible for investigating the probable causes of aviation accidents. NTSB and Federal Aviation Administration representatives state that the litigation of fault does not uncover any major aviation safety related facts that have not already been discovered by their agencies. Supporters of the protocols have also noted that facts discovered during the civil litigation of fault may not become public if the cases are settled and sealed before trial.

We are aware of the assertion that evidence of fault in the airlines' security system has been uncovered by the Lockerbie litigation. Mr. Lee Kreindler, lead counsel and chairman of the Plaintiffs' Committee in the Lockerbie case, stated this in his testimony on the Montreal Protocols before the Senate Foreign Relations Committee on November 15, 1989, as well as in an interview with us on March 29, 1990.

Because the criminal investigation of this disaster by government agencies of several countries, including the United States, has not been completed, it is not possible to ascertain at this point whether the evidence uncovered by litigation would also have been found by these agencies.

JURISDICTION

At the hearing we discussed the achievability of jurisdiction in U.S. court and instances in which a foreign nation's law would be applied by a U.S. court. I am aware of strong legal opinion that virtually every defendant airline in the world could be sued in U.S. court and that in the vast majority of the cases U.S. law would apply.

Question. You cited two examples of American passengers on foreign airlines flying between foreign points when a U.S. court ruled that foreign law should apply. Do these cases predate a revolution in the choice of law now applied by most U.S. courts? Do not most U.S. courts now apply the law of the country based on the domicile of the decedent?

Answer. The case cited in our testimony included *Tramontana* v. *S.A. Empresa De Viacao Rio Grandense,* 350 F.2d 468 (D.C. Cir. 1965) and *Barkanic* v. *China,* 21 Av.Cas. 17,523 (1988). In both of these cases the court saw fit to apply the law of the foreign country due to the circumstances of the case. Both cases applied conflict of law rules as set forth in the Restatement (Second) of Conflict of Laws (1969).

Section 145 of the restatement outlines the general principles to be followed:

—The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to the issue, has the most significant relationship to the occurrence and the parties under the principles stated in section 6.

—Contacts to be taken into account in applying the principles of section 6 to determine the law applicable to an issue include:

place where the injury occurred;
place where the conduct causing the injury occurred;
the domicile, residence, nationality, place of incorporation and place of business of the parties; and
the place where the relationship, if any, between the parties is centered.

Specifically, in actions involving wrongful death, the restatement states, "The local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in section 6 to the occurrence and the parties, in which event the local law of the other state will be applied."

In another recent case, *Harris* v. *Polskie Linie Lotnicze*, 820 F.2d 1000 (9th Cir. 1987), the court held that federal common law requires a choice of law analysis similar to that set forth in the Restatement (Second) of Conflicts of Laws Section 175.

Although domicile of the decedent is an important factor in deciding which law to apply, it is not the only one. It is clearly shown from the above cases that under current conflict of law rules there will be cases where, even if a plaintiff gets jurisdiction in U.S. courts, there is no guarantee that the courts will apply U.S. law.

PRICE OF INSURANCE

In your statement, you compare the estimated cost of the supplemental plan ($3 per ticket) to individual flight insurance you can buy at an airport—which you estimate at $10 for $300,000 of coverage.

Did you know that if I buy an international ticket with my American Express card, I am automatically covered by $100,000 of travel life insurance. And did you know that for just $4, I can buy an additional $250,000 of coverage? In other words, most credit card users can have $350,000 of trip insurance for just $4. This is life insurance. Survivors do not have to prove damages, as they would under the supplemental plan.

Question. My point is that your comparison is invalid. On what basis did you choose the most inefficient means of purchasing trip insurance for purposes of your comparison?

Answer. We are aware of the travel insurance benefits that a passenger can receive with an American Express Gold card, after paying an annual membership fee of about $70 and an additional $4. Our example, like the American Express example, underscores the fact that trip insurance provides limited recovery for a fee. On the contrary, under the supplemental compensation plan, an American claimant, for an estimated $3 surcharge, can receive full compensation for provable economic and noneconomic damages suffered in international air transportation. Recent death settlements resulting from U.S. aviation accidents that are not governed by the Warsaw Convention rules have averaged about $800,000.

GAO Responses to Questions Asked by Senator Nancy Landon Kassebaum

Question. At various times, individual trial lawyers, including Mr. Kreindler, a witness at our November hearing, have said they would support the protocols if they were modified to include unlimited damages recovery. That has now been done. To the best of our knowledge, what is the basis for their opposition at this time?

Answer. Trial lawyers who oppose the protocols have told us that they are against the protocols because Protocol No. 3 would eliminate the civil litigation of fault, thereby eliminating both a forum in which claimants can face parties at fault and a major mechanism to uncover facts in aviation accidents. They believe that, in the absence of this mechanism, critical safety-related facts would not be uncovered and that airline safety would be adversely affected.

Question. The treaties provide for strict liability and therefore, U.S. citizens would be compensated even in the event of a terrorist act or attack. Is not that protection broader than a fault-based system?

Answer. Protocol No. 3 and the supplemental compensation plan would offer protection to Americans seeking compensation for damages suffered in international air transportation that is broader than a fault-based system. This is because these Americans would be compensated for both economic and noneconomic damages without having to prove that the airline was at fault. Under a fault-based system, fault must be proven by the claimants or accepted by the defendant before obtaining compensation for damages. In the event of a terrorist act or attack, fault on the part of an airline might be difficult to prove.

Question. The airlines of Europe and Japan maintain excellent safety records, yet those countries do not have tort systems like ours. Did you find any evidence to suggest that reforming the Warsaw system to provide adequate compensation to passengers would have negative effect on safety?

Answer. Testimonial evidence on the part of the opponents of Protocol No. 3 suggests that it would adversely affect airline safety by eliminating the civil litigation of fault. This evidence is not supported by empirical data or studies. We could not find any factual evidence that ratification of the Montreal protocols would have negative impacts on airline safety. On the contrary, the available evidence, including the 1988 Rand study and the 1989 Clemson study, supports the conclusion that the civil litigation of fault has not provided incentives to aviation safety.

Question. There are those who suggest that we do not need treaties of international aviation. Yet, the AMOCO *Cadiz* disaster (an oilspill) is still in litigation after 10 years, and one of the reasons cited for the delay is the lack of treaties governing maritime disasters. If the protocols are not ratified, would not the same problems exist for international air transportation as the result of jurisdictional and choice of law problems?

Answer. In the absence of any international treaty, it would be much more difficult in some cases for U.S. plaintiffs to get full compensation in as expeditious a manner as would be available if the senate ratified the Montreal protocols.

Jurisdictional problems in the absence of the convention would probably not be any more severe than they would be if the United States ratified the Montreal protocol. This is because in most cases foreign airlines maintain ticket offices in the United States which form the basis for establishing "minimum contacts" for jurisdictional purposes.

Choice of law problems, however, would be much worse if the Warsaw Convention were not in place. Instead of applying the rules of the Warsaw Convention, choice of law rules would govern which country's law would be applied. This could possibly lead to the application of laws other than those of the United states, depending upon the circumstances of a given case. Section 145 of the Restatement (second) of Conflict of Laws (1969) outlines the general principles that would be applied:

—The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in section 6.

—Contacts to be taken into account in applying the principles of section 6 to determine the law applicable to an issue include:

Place where the injury occurred.

Place where the conduct causing the injury occurred.

The domicile, residence, nationality, place of incorporation and place of business of the parties.

The place where the relationship, if any, between the parties is centered.

In actions involving wrongful death, the law of the place of injury will govern unless another forum has a more significant relationship with the suit. This can lead, and has led, to the application of foreign law by U.S. courts. *Tramontana* v. *S.A. Empresa De Viacao Aerea Rio Grandense,* 350 F.2d 468 (D.C. Cir. 1965) (Brazilian wrongful death statute applied); *Borkanic* v. *China,* II Av.Cas. 17,523 (1988) (Chinese wrongful death statute applied); and *Harris* v. *Polskie Linie Lotnicze,* 820 F.2d 1000 (9th Cir. 1987) (Polish law applied; also stated that federal common law required that choice of law analysis mirror that set out in the Second Restatement). Even if the United States denounced the Warsaw Convention there would be no guarantee that its liability limitation would not be applied to Americans. The convention would be the applicable law if the flight involved had a point of origin and a point of destination in Warsaw Convention countries.

The complications of litigating a case where difficult choice of law issues arise, and where no international convention governs, can be seen in the AMOCO *Cadiz* case. Without the Warsaw Convention standards on jurisdiction, liability, and other issues, a similar situation could occur in the case of airline accidents. The AMOCO *Cadiz* case involved an oilspill off the coast of France by a Spanish-made, U.S.-owned tanker where French plaintiffs brought suit in U.S. courts. The complicated jurisdiction, choice of law, and evidentiary questions have dragged the litigation process out for 10 years, still without final resolution.

Question. Weighing all of its elements, would you say that the adoption of this package—Montreal Protocol No. 3 and the revised supplemental compensation plan—would be beneficial to the American consumer?

Answer. The protocol and the supplemental compensation plan would be beneficial to Americans seeking compensation for damages in international air transpor-

tation because these individuals would be able to secure full compensation for provable economic and noneconomic damages without having to prove the fault of an airline. American claimants would be able to receive full compensation for their damages in a less expensive and more expeditious manner. Claimants might obtain substantial savings in litigation costs, which in some cases include contingency fees of about 33 percent.

If the protocols are ratified, the United States should seek to increase the airline liability limits for passenger, baggage, and cargo losses through the International Civil Aviation organization. Because these limits were set in 1975, their value has been eroded by inflation. The United States should seek to increase the airline liability limit for passenger death and injury not only because of inflation but also because airlines should pay a larger share of passenger compensation.

If the protocols are ratified, it would be advisable that the Secretary of Transportation submit the supplemental compensation plan, before approving it, to an independent panel of experts to make certain that the final version of the plan does the following:

—Covers all Americans in international air transportation, whether or not they are subject to the Protocol No. 3 regime. (see June 15, 1990, letter to the chairman of the Senate Committee on Foreign Relations by DOT's Assistant Secretary for Policy and International Affairs.)

—Provides for an adequate total amount of money per aircraft per accident to compensate claimants.

—Does not have any legal or technical shortcomings that could affect its implementation.

Question. If Montreal Protocol No. 3 and the supplemental compensation plan, as currently proposed, had been in place back in 1983, what would have been the disposition of the cases brought by the families of the victims of KAL Flight 007 and PanAm Flight 103? Please give your best estimation in terms of the time involved and the compensation awarded. Would the cases involving KAL Flight 007 still be pending?

Answer. In both cases, it is possible that most cases would have been settled within 9 months or less given that American claimants would only have to prove damages. American claimants would have received compensation for economic and noneconomic damages without incurring the delays and legal costs associated with the litigation of fault.

The airlines would have had incentives to settle cases within 6 months of receiving claims for damages. Given that most death settlements would be above the airline liability limit established by the protocol, airlines would probably have settled cases soon after receiving claims. By settling cases within 6 months, airlines would have avoided the additional legal costs that a court could have imposed on them.

In both cases, the plan would have settled most cases within 3 months of whichever of the following occur later: the plan receiving a claim or the airline making a payment equal to its limit of liability. By settling cases within 3 months, the plan would have avoided the additional legal costs that a court could have imposed on them.

Thus, under the protocol and the plan, it is unlikely that most KAL Flight 007 cases would still be pending.

The compensation awarded would have fully compensated American claimants for provable economic and noneconomic damages. It is expected that compensation under the protocol and the plan would have been at least as high as that obtained under the U.S. tort system. On average, current death settlements under the U.S. tort system are about $800,000. The Rand study concluded that aviation settlements under the U.S. tort system tend to be less than actual losses to survivors because the risks of a jury trial encourage families of victims to settle for less than their actual losses. Since these risks would be less under the supplemental compensation plan, death settlements under the plan might be higher.

The CHAIRMAN. I have no further questions at this time.

Senator BIDEN. Nor do I.

Thank you very much, gentlemen. I appreciate your testimony.

The CHAIRMAN. Thank you very much for being with us.

Mr. MEAD. Thank you.

The CHAIRMAN. We wish you well.

The hearing is adjourned.

[Whereupon, at 11:35 a.m., the committee adjourned.]

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